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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. [redacted] 160

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

THE PIERCE GOVERNOR COMPANY, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

NATIONAL LABOR RELATIONS BOARD

and

THE PIERCE GOVERNOR COMPANY, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on March 6, 1968.

Opinions Below

The opinion of the Court of Appeals (*infra*, p. 38a) has not yet been officially reported; it is unofficially reported at 67 LRRM 2695. The opinion of the National Labor Relations Board (*infra*, p. 23a) is reported at 164 NLRB No. 2.

Jurisdiction

The judgment of the Court of Appeals was entered on March 6, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Question No. 1

Can an employer who has relocated his plant satisfy his duty to bargain concerning transferring his old employees to the new location if he insists throughout that they must apply for reemployment at the new location on the same basis as all other applicants, as the Court below decided, in direct conflict with the Second Circuit's *Cooper Thermometer* decision?

Question No. 2

Can an employer who has negotiated and signed successive collective bargaining agreements with a certified international union and its uncertified local lawfully refuse to recognize the local at the new location to which it moves its plant, while offering to recognize the international, on the ground either:

(a) That only the international held an NLRB certification, so that the employer was *never* obliged to recognize the local, not even at the old location (a ground which was not a basis for the Labor Board's decision); or

(b) That although the new plant was merely a continuation of the old operation 32 miles away, the old employees did not constitute a majority there?

Question No. 3

Can an employer who relocates his plant satisfy his duty to bargain if he maintains throughout that he will not rehire at the new location old employees he considers lazy or guilty of strike misconduct at the old location?

Statute Involved

The statute involved is the Labor Management Relations Act, 61 Stat. 136, et seq. (1947), 29 U.S.C. § 151, et seq. The specific sections involved are 7; 8(a)(1), (2), (3) and (5); (8)(d); and 9(a). They are set forth in the Appendix, *infra,* pp. 61-62a.

Statement of the Case

*The Facts**

Petitioner (hereinafter the International) has been the certified bargaining agent of the Company's employees in its plant in Anderson, Indiana since 1941. Since then the Company and the International and its Local 940 (hereinafter sometimes referred to together as the Unions) have been parties to successive collective bargaining agreements (*infra,* p. 42a). The recognition clause of the last agreement named the International and the Local as "the exclusive bargaining agency for all the company's employees" (*infra,* p. 48a).

In September 1964 the parties were bargaining on a new collective bargaining agreement to replace the one that would expire on October 30. On November 6 the employees, with the Unions' authority, went out on what was in its inception an economic strike in support of their bargaining demands (*infra,* pp. 39a-40a). Negotiations on the new contract continued, but on December 16 the Company announced that it wished to move its plant to Upland, a neighboring town 35 miles away (*infra,* pp. 38a-39a). The Unions responded by demanding: (1) that all Anderson

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* This statement of the facts is based for the most part on the court below's decision, set forth in the Appendix to this Petition, and all page references herein are to that decision, except those for statements based on the Trial Examiner's Decision, which are in the style (*infra,* p. 1: Trial Exam.), and those based on the Board's decision, which are in the style (*infra,* p. 1: Bd).

plant employees be "guaranteed" transfer to Upland, and (2) that the Company recognize the Unions at Upland and bargain with them concerning terms and conditions of employment there (*infra*, p. 39a).

The Company rejected the demand for transfers. It took the position throughout that Anderson plant employees interested in employment at Upland would have to apply for reemployment by filing new employment applications there (*infra*, p. 39a). The Company added that applications from its Anderson employees would be given equal consideration with all others it received, including those from Upland applicants, and proposed that old employees hired at Upland would retain the seniority they had earned at Anderson, while those not hired would receive separation pay (*infra*, pp. 39a, 40a-41a). It warned that certain Anderson employees would definitely *not* be reemployed at Upland: those it considered physically incapable,[1] lazy, or guilty of misconduct in the strike (*infra*, pp. 39a-40a). The Unions rejected the Company's position (*infra*, p. 40a).

On the matter of recognizing the Unions at Upland and bargaining with them on terms and conditions of employment there, the Company insisted that it would not recognize Local 940 at Upland until such time as it became the certified bargaining representative at the new plant, or could convince the Company that it represented a majority of employees there (*infra*, p. 40a). At no time, however, did the Company refuse to recognize the International at Upland (*infra*, pp. 42a-43a). Its refusal was limited to Local 940.[2] For example, a letter to the In-

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[1] Later the Company proposed that the employees it considered physically incapable be examined by an independent arbitrator (*infra*, p. 40a).

[2] Though neither the Board nor the court below commented on it, the Trial Examiner found "personal antagonisms between the principal negotiators on both sides" and that "one of Respondent's major efforts in the

ternational from the Company, dated January 28, 1965, was prefaced with the statement "That we are not obligated to recognize Local 940" for any purpose other than at Anderson, but stated the Company's willingness to "arrive at some agreement with you" about Upland (*infra*, p. 43).

The ensuing impasse went to the Board (*infra*, p. 40a). The International filed the unfair labor practice charge involved herein on August 28, 1965. By that time the Upland plant was in full operation (*infra*, p. 46a). Earlier, in December 1964, the Unions had twice requested the Company to survey the employees to determine how many were interested in working at Upland. The Company refused both requests (*infra*, pp. 26a-27a: Bd). As of the filing of the unfair labor practice charge the Anderson employees and the Unions were still on strike and picketing the Anderson plant, and pickets were also stationed at the Upland plant (*infra*, p. 13a: Trial Exam., p. 24a: Bd). Although 85% of the supervisory and clerical personnel from Anderson were employed at the new location, bargaining unit employees from Anderson did not constitute a majority there (*infra*, pp. 48a, 46a).

*The Trial Examiner's Decision**
(*Infra*, pp. 1a-22a)

The Trial Examiner found that, while only the International was certified as the bargaining agent in 1941, the International and the Local constituted a "single, joint representative" of the employees by virtue of their having jointly negotiated, signed and administered all the collec-

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contract negotiations was to eliminate the necessity of dealing with International Representative Shetterly and the members of the [Local 940] negotiation committee" (*infra*, p. 5a: Trial Exam.).

* All page references herein are to the Trial Examiner's Decision, set forth in the Appendix.

tive bargaining agreements since then (*infra,* p. 15a).

He also found that the Anderson and Upland plants are only 32 miles apart and that the Company's ownership, management, clerical and supervisory personnel, product and operations remained unchanged from what they were at Anderson (*infra,* p. 12a). He concluded that the Company's obligation to recognize and bargain with the Unions was in no way affected by the move, therefore, and continued unimpaired at Upland. He said:

> "On the basis of these facts, it seems clear that the removal of the plant from Anderson to Upland had no greater significance, in this context, than would have had its removal across the street and, therefore, that the move effected no substantial change in the status or obligation of Respondent toward its employees or their bargaining representative, the Union. [citations omitted]" (*Infra,* pp. 12a-13a).

He held that the Company's refusal to recognize the Local as an integral part of the joint bargaining agency was in violation of its obligation under Section 8(a)(5) of the Act, and, specifically, that the Company had not fulfilled its duty to bargain concerning the effect of the relocation on its employees (*infra,* pp. 16a, 17a). The strike, although economic in its inception, had become an unfair labor practice strike, he concluded, and ordered reinstatement of the Anderson strikers at Upland with back pay (*infra,* p. 18a).

*The Labor Board's Decision**
(*Infra,* pp. 23a-37a)

The Labor Board, in reversing the Trial Examiner, found that the Company satisfied its duty to bargain concern-

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* Page references herein are to the Labor Board's decision, set forth in the Appendix.

ing transferring its old employees to the new location (*infra,* p. 35a). It also found that less than a majority of the old employees were interested in working at the new location (*infra,* p. 36a). Since this was not due to any failure of the Company to bargain on transfers, the Company was under no duty to recognize the Unions at the new location, the Board concluded (*infra,* p. 36a).

*The Court of Appeals' Decision**
(*Infra,* pp. 38a-48a)

The Court of Appeals affirmed. It ruled, first, that the Company satisfied its duty to bargain on transferring the old employees to the new location (*infra,* p. 41a). On this branch of the case the court found as follows. The Company rejected the Unions' demand that the Anderson employees be transferred to Upland. It proposed and insisted throughout that Anderson employees interested in working at Upland apply for reemployment there, and that their applications would be considered equally with all others, including those from applicants from Upland. It further proposed that those old employees hired at Upland would retain their seniority, and that those not hired would receive separation pay. The Company also insisted that at Upland it would not hire Anderson employees it considered physically incapable, lazy, or guilty of misconduct in the strike.[3] Later the Company proposed that

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* All page references herein are to the Court of Appeals' decision, set forth in the Appendix.

[3] "The Company's position was that it would give consideration to any Anderson employee who applied at Upland, with retention of seniority for all those hired, but would not 'guarantee' transfer, because some of the employees at Anderson were physically unable to perform a full day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike which the Union had

the employees it considered physically incapable be examined by an independent arbitrator (*infra*, p. 40a).

The Court held, however, that the Company was entitled to insist on this position, and that its doing so was merely hard bargaining and did not constitute a failure to bargain concerning transfers. The Court said:

> "The Company had a well-defined position on transfers, which it stated, explained and discussed at great length. *This position did not change throughout the bargaining*, but such a course is not unlawful. *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960); *NLRB* v. *American Ins. Co.*, 343 U.S. 395 (1952); *NLRB* v. *Southwestern Porcelain Steel Corp.*, 317 F. 2d 527 (10th Cir. 1963); *NLRB* v. *Mayer*, 196 F. 2d 286 (5th Cir. 1952); *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485 (7th Cir. 1942). The Act does not require yielding of a position fairly maintained, and there is an explicit provision to that effect in the statute [citing Sec. 8(d) of the Labor Act: *infra*, pp. 61a-62a]." (*Infra*, p. 41a; our emphasis).

It is a rule of this case therefore, that an employer engaged in a relocation of his plant can satisfy his obligation to engage in collective bargaining on transferring his employees by insisting that they apply at the new location for reemployment there and maintaining that their applications will be treated equally with all others. It is also a rule of this case that the employer can maintain that at the new location he will not hire employees from the old

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initiated in November, 1964, when negotiations on the original Anderson contract had broken down." (*Infra*, pp. 39a-40a).

* * * * *

"The Company assured the Union that no jobs had been promised at Upland and that all applications would be given equal consideration * * *." (*Infra*, p. 40a).

location whom he believes lazy or guilty of strike misconduct, without committing an unfair labor practice.

A majority of the court below also held that the Company did not violate its bargaining duty by refusing to recognize the Local at the new location. It based this ruling on two grounds.

First, it concluded that since only the International held an NLRB certification, the Company had *never* been under a duty to recognize it, not even at the old location—even though the Local and the International had become a single, joint bargaining agent by virtue of having negotiated, signed and administered successive bargaining agreements for the unit.[4] All the Local had ever enjoyed was "a preferred status in understanding the problems peculiar to . . . (the) locality" the majority added (*infra*, p. 43a). This ground had not been a basis for the Labor Board's decision. Indeed, the Labor Board did not even consider it. The majority's second ground was that, regardless whether the Local had been entitled to recognition at the old location, it was not at the new, since the old employees did not constitute a majority there.[5]

This branch of the case, therefore, stands for the following two rules. (1) Where an uncertified local union and

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[4] "[W]here the International has been certified, an employer could hardly be held guilty of an unfair labor practice for failing to recognize a local union which was not certified. *And we think this rule must apply even if the Local acts as an integral part of the single joint representative of the employees at the bargaining table.* An uncertified organization cannot, it seems to us, inject itself, or be injected by a friendly parent, into a labor relationship where there is a certification, in the face of the statutory provisions as to exclusiveness, certification, etc. [citing Section 9(a) of the Labor Act; *infra*, p. 62a]." (*Infra*, p. 43a; our emphasis).

[5] "But beyond this, Local 940, whatever its status at Anderson, was shown not to be the representative of the employees at Upland." (*Infra*, pp. 43a-44a).

. . . . . .

"The fact is that employees formerly at Anderson who were members of Local 940 did not constitute a majority of employees at Upland." (*Infra*, p. 46a).

its certified international have become a joint bargaining agency by virtue of having negotiated, signed and administered contracts for the unit together, the employer does not commit an unfair labor practice by according only the certified international recognition under the Labor Act. (2) Although the new location to which an employer moves his plant is merely a continuation of the old operation 35 miles away, the employer can lawfully refuse to recognize the union at the new location if the old employees do not constitute a majority there.

The Dissenting Opinion
(*Infra*, pp. 47a-48a)

Chief Judge Bazelon, dissenting, rejected both of the majority's grounds for ruling that the Company was under no duty to recognize the Local at the new location. As to the first ground, he said:

> "[T]he distinction drawn by the majority between Local 940 and the International for purposes of representation is untenable. Employees have the right to bargain through representatives of their own choosing. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936). And the Act does not prohibit the employees from adding an additional bargaining agent provided the certified representative is not excluded. *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). The fact that only the International was 'the certified bargaining agent' does not exclude the Local which had jointly represented the employees for 26 years, nor does it abrogate the company's agreement in its last contract, signed by the International and the Local, recognizing 'Local Union 940 . . . and the International Union . . . as the exclusive bargaining agency for all the company's employees.'" (*Infra*, pp. 47a-48a).

As to the second ground, he was of the view that if the Upland plant was merely a continuation of the Anderson operations at a new location only 35 miles away, the move did not present an occasion for questioning the Unions' majority status. He called attention to the facts that (1) the Trial Examiner had found the move of no more significance than a move across the street; (2) 85% of the old supervisory and clerical employees were able to work at the new location; and (3) there was no suggestion that the Anderson employees were not the principal family wage earners (*infra*, p. 48a). He would have remanded to the Board for reconsideration of the continuation question (*infra*, p. 48a).

Reasons for Granting the Writ

As to Question No. 1
(*Supra*, p. 2)

1. The court below's decision that the Company satisfied its duty to bargain concerning transferring its old employees to the new location, although it insisted throughout that they must apply for reemployment there on the same basis as all other applicants, is in square conflict with the Second Circuit's decision on this point in *Cooper Thermometer Co.* v. *NLRB*, 376 F. 2d 684, 687-88 (2d Cir. 1967) (*infra*, pp. 49a-60a, 53a-54a).

On the employee transfer issue the facts of the two cases are virtually identical. In *Cooper* the move was to a town 27 miles away (*infra*, p. 49a); here the new location is 35 miles away (*infra*, p. 39a). In *Cooper* the union, upon being advised of the move, demanded that the old employees "be taken to [the new location] with existing rights and benefits" (*infra*, p. 51a); here the Unions demanded that the Company " 'guarantee' the transfer of all em-

ployees" (*infra*, p. 39a). In *Cooper* the employer refused to do more than offer to accept "applications for the new plant from present employees, whom it would consider equally with all other applicants" (*infra*, p. 50a); here, the Company rejected the Union's demand that transfers be "guaranteed" and took the position "throughout" that "it would give consideration to any Anderson employee who applied at Upland" and "all applications would be given equal consideration" (*infra*, pp. 39a, 40a).

In short, in both cases the employer's position was that old employees would not be transferred to the new location but would have to apply for reemployment there, and that it would consider applications from the old employees equally with those from all others who might apply, including applicants from the new location, who had never worked for the employer before.[6]

The Second Circuit held that an employer who relocates its plant has a duty "to bargain over the transfer of employees to the new plant" (*infra*, p. 49a), that is "to discuss with [the union] the basis on which employees may transfer" (*infra*, p. 54a). It ruled that the employer's position had not satisfied that duty, because, rather than engaging in collective bargaining with the union on the subject, it insisted upon dealing directly and individually with the employees themselves. The court said:

> "While Cooper was not bound to agree to the Union's demand that the Pequabuck employees 'be taken' to Middlefield with everything unchanged or even to less burdensome proposals, the Board could properly fault it for an attitude which, in effect, ousted the Union

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[6] The two cases are identical even with respect to what was offered employees not rehired at the new location: severance pay (*infra*, pp. 51a, 40a-41a) and assistance in finding employment in the area of the old location (*infra*, pp. 50a, 41a).

> from any role in negotiating what might be offered to employees desiring to transfer." (*Infra*, p. 54a).

In the instant case the court below found no violation in the Company's position, saying, "This position did not change throughout the bargaining, but such a course is not unlawful" (*infra*, p. 41a).

2. The Second Circuit's rule has the greater merit, we submit. The bargaining on transfers that Section 8(a)(5) of the Act requires of a relocating employer is *collective* bargaining. To insist that whether old employees will be rehired at the new location will be decided on the basis of each employee's application for reemployment there, as the employers in both cases did, is not *collective* bargaining at all, but a throwback to individual bargaining, as the Second Circuit correctly concluded (*infra*, p. 54a).

The court below's ruling that the Company's "well defined position on transfers" which "did not change throughout", was merely hard bargaining (*infra*, p. 41a), overlooks the fact that the bargaining contemplated by that position was not bargaining with the union, but bargaining with the individual employees. Hard bargaining with a union satisfies the bargaining duty. *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477. Bargaining with individual employees, hard or soft, does not. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678.

3. The position taken by the employers in *Cooper* and this case—that old employees can apply at the new location on the same basis as other applicants—is a fairly typical one. E.g., *Zdanok* v. *Glidden*, 288 F. 2d 99, 101 (2d Cir. 1961), *cert. granted on other grounds*, 368 U.S. 814; *Fried* v. *Glenn Electric Heater Corp.*, 198 F. Supp. 248, 250-51 (D.N.J. 1961); *Slenczka* v. *Hoover Ball & Bearing Co.*, 215 F. Supp. 761, 762 (N.D. Ohio 1963). Whether this position satisfies the duty to bargain on transferring the old employees to

the new location is, therefore, a question of considerable importance to employees, unions, and employers. The Second Circuit has ruled that the position does not satisfy the bargaining duty, and the court below has ruled that it does.

We ask this Court to resolve the direct conflict between the two circuits on this important question of Labor Act law.

As to Question No. 2(a)
(*Supra*, p. 2)

1. The question of whether an uncertified local union which, teamed with its certified international, has negotiated, signed and administered successive contracts for a bargaining unit can lawfully be denied recognition under the Labor Act on the ground that only the international, as the certified agent, is entitled to that right, is an important question of Labor Act law which has not been, but should be, decided by this Court. Although decided by the court below as its first ground for holding that the Company had no duty to recognize the Local at the new location, it was not decided by the Labor Board, which based its decision on a different ground.

The majority below ruled that the Company had no duty to recognize the Local at the new location because it *never* had a duty to recognize it, not even at the old location. The International held an NLRB certification and the Local did not, the majority noted. In such situations, it reasoned, it is the certified international that has the right to recognition, and not the uncertified local, even though the two unions constitute a single joint bargaining agency by virtue of having negotiated, signed, and administered contracts for the unit together. So long as the employer recognizes the certified international, it cannot be guilty of an unfair labor practice in refusing to recognize the uncertified local. As the majority put it:

> "[W]here the International has been certified, an employer could hardly be held guilty of an unfair labor practice for failing to recognize a local union which was not certified. And we think this rule must apply *even if the Local acts as an integral part of the single joint representative of the employees at the bargaining table.* An uncertified organization cannot, it seems to us, inject itself, or be injected by a friendly parent, into a labor relationship where there is a certification, in the face of the statutory provisions as to exclusiveness, certification, etc. [citing Section 9(a) of the Labor Act; *infra,* p. 62a]." (*Infra,* p. 43a; our emphasis).

The majority added that the most the uncertified local enjoys in such situations is a "preferred status in understanding the problems peculiar to . . . (the) locality" (*infra,* p. 43a).[7]

While the Trial Examiner had addressed himself to the fact that only the International held an NLRB certification, the Labor Board had not. The Trial Examiner found, as the Board and court below did, that the International and the Local had become a single, joint representative of the employees in the unit (*infra,* pp. 15a, 23a-24a, 42a). Indeed, for him this was the reason the Company could *not* lawfully recognize only the International (*infra,* p. 15a). The Labor Board, while ruling that the Company was not under a duty to recognize "the Union" at the new loca-

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[7] Chief Judge Bazelon, dissenting, said:

> "[T]he distinction drawn by the majority between Local 940 and the International for purposes of representation is untenable. Employees have the right to bargain through representatives of their own choosing. *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33 (1936). And the Act does not prohibit the employees from adding an additional bargaining agent provided the certified representative is not excluded. *NLRB* v. *Borg-Warner Corp.,* 356 U.S. 342, 350 (1958). The fact that only the International was the certified bargaining agent does not exclude the Local which had jointly represented the employees for 26 years * * *" (*infra,* pp. 47a-48a).

tion, did not base its decision on, or even discuss, the matter of certification. The certification ground, therefore, was relied upon only by the majority below, and not the Board.[8]

2. The majority's rule, if allowed to stand, would affect established bargaining relationships across the country. The type bargaining agency that figures in this case—a certified international teamed with an uncertified local as a joint bargaining agent—is commonplace among unions in which most organizing is done by the international, such as Petitioner. In such unions the international, after organizing a plant, files a petition for an NLRB representation election and, if it wins, is issued a certification in its name. It is only then that the international either charters a new local for the plant or assigns it to an existing one. The certified international and the uncertified local then negotiate, sign, and administer contracts covering the plant together.[9]

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[8] Despite *Standard Oil Co.*, 92 NLRB 227 (1950), *modified on other grounds*, 196 F. 2d 892 (6th Cir., 1952), in which the Board found no violation in the employer's refusal to bargain on a particular subject with the uncertified international where the local held the certification (see also *Standard Oil Co.*, 137 NLRB 690 (1962), *affirmed on other grounds*, 322 F. 2d 40 (6th Cir. 1963)), we think it possible that in this case the Board would have decided this issue the other way from the court below, had the Board decided it. In *The Ingalls Shipbuilding Co.*, 143 NLRB 712 (1963), the Board required the employer to recognize the uncertified union that was the authorized agent of the certified union. Moreover, the Board has ruled an employer guilty of a refusal to bargain in denying recognition to the uncertified local with which a certified local merged. E.g., *Montgomery Ward and Co.*, 154 NLRB 1197 (1965), *enf'd*, 373 F. 2d 655 (D.C. Cir. 1967). And in many cases the Board has required the employer to recognize a certified union's uncertified successor. E.g., *The Pacific Telephone and Telegraph Company and Bell Telephone Company of Nevada*, 113 NLRB 478, 518-20 (1955); *Cochran Co., Inc.*, 112 NLRB 1400, 1408 (1955); *NLRB* v. *Harris-Woodson Company, Inc.*, 179 F. 2d 720 (4th Cir. 1960).

[9] See Forkosch, *Treatise on Labor Law* (2d ed. 1965), pp. 185-86, 191. See also, e.g., *NLRB* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 339; *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 344; *Independent Stove Co., Inc.* v. *NLRB*, 352 F. 2d 553, 554-55 (8th Cir. 1965), *cert. denied*, 384 U.S. 962; *Standard Oil Co.* v. *NLRB*, 322 F. 2d 40, 42 (6th Cir. 1963).

It is fair to assume, we believe, that until the decision in this case unions and employers who have been parties to such bargaining relationships have assumed that *both* unions in the joint bargaining agency are entitled to full recognition under the Labor Act—the uncertified local as well as the certified international. The rule that only the certified union can command the statutory duty, while the uncertified has only a "preferred status", would, we believe, have an unstabilizing effect on all such relationships.

3. The rule conflicts with the long and well established principle that a union designated by a majority of the employees in the bargaining unit is entitled to full recognition under the Labor Act, regardless of whether or not it holds an NLRB certification. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, and *NLRB* v. *Bradford Dyeing Assn.*, 310 U.S. 318.

While it is true that in the situations to which the rule of this case is addressed the uncertified local was not on the ballot with the international in the NLRB election, in most such cases the uncertified local has demonstrated its majority status in some other way in the ordinary course of the collective bargaining relationship. Where, for example, the collective bargaining agreement includes a provision requiring the employer to check off union dues or agency shop fees for employees who have given the employer written authorizations, as in the instant case (J.A. 104),[10] receipt by the employer of such authorizations from a majority of the employees demonstrates the union's majority status and right to statutory recognition. See *Hart Cotton Mills, Inc.*, 91 NLRB 728, 735 (1950), *rev'd on other grounds*, 190 F. 2d 964 (4th Cir. 1961). Or where the union calls a strike and a majority of the employees join it, the

[10] Such references are to the Joint Appendix filed in the court below and included in the record certified to this Court.

union's majority status and right to recognition have been effectively evidenced to the employer. See *National Gas Co.*, 99 NLRB 273 (1952), *rev'd on other grounds*, 215 F. 2d 160 (8th Cir. 1954). And where the members of the union take a strike vote and advise the employer of the results, a "yes" vote from a majority demonstrates the union's right to recognition under the Act. *Lambert d.b.a. Sue-Ann Mfg. Co.*, 98 NLRB 848 (1952), *enf'd*, 211 F.2d 91 (5th Cir. 1954).

In most cases, therefore, the uncertified local has demonstrated its majority in some satisfactory manner and is entitled to statutory recognition. Under the rule of this case, however, the employer can deny the uncertified local the recognition to which it is entitled under the *Arkansas Oak Flooring* line of cases simply because the international is in the bargaining agency and happens to hold an NLRB certification. We ask the Court to grant certiorari to resolve this conflict in principle.

4. The rule that an employer can deny recognition to an uncertified local which, along with its certified international, constitutes a joint bargaining agent, conflicts with the well established principle that an employer and a certified international can lawfully name the international's uncertified local in the contract's recognition clause a union party to be recognized, and that such a recognition clause is enforceable. *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-50; *NLRB* v. *Winchester Electronics, Inc.*, 295 F. 2d 288, 291 (2d Cir. 1961).

In the instant case, though only the International was certified, both the International and the Local were named in the recognition clause "as the exclusive bargaining agency."[11] In *Borg-Warner, supra,* this Court said a

[11] "The Company hereby recognizes Local Union No. 940, UAW, and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America . . . as the exclusive bargaining agency for all the Company's employees, except * * *." (J.A. 103).

certified international can insert its uncertified local in the recognition clause of the contract, if the employer agrees, and enforce that promise of recognition. Yet the majority below said, "An uncertified organization cannot, it seems to us, inject itself, *or be injected by a friendly parent,* into a labor relationship where there is a certification * * *" (*infra,* p. 43a; our emphasis). Under *Borg-Warner, supra,* the Unions could have sued to enforce the Company's promise to recognize the Local as a part of "the exclusive bargaining agency." Yet the majority below insisted that the Company's denial of recognition to the Local was not unlawful under Section 8(a)(5) of the Act.[12]

We ask the Court to grant certiorari to resolve this apparent conflict between the extent to which the Labor Board can enforce the recognition of this type bargaining agent under Section 8(a)(5) of the Labor Act, and the extent to which the courts can, under Section 301(a) of the Act.

As to Question No. 2(b)
(*Supra,* p. 2)

The question of whether an employer is relieved of its duty to recognize the union at a new plant which is merely a continuation of the old operation a short distance away, if the old employees do not constitute a majority at the new location, is an important question of Labor Act law which has not been, but should be, decided by this Court. The court below decided it as the second ground for holding that the Company did not have to recognize the Local at the new location.

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[12] Chief Judge Bazelon, dissenting, said, "The fact that only the International was 'the certified bargaining agent' does not exclude the Local which had jointly represented the employees for 26 years, *nor does it abrogate the company's agreement* in its last contract, signed by the International and the Local, *recognizing 'Local Union 940 . . . and the International Union . . . as the exclusive bargaining agency for all the company's employees.'*" (*Infra,* p. 48a; our emphasis).

The old operation was simply removed 35 miles and continued as before. In addition, 85% of the clerical and supervisory employees were employed at the new location. To the Trial Examiner the situation was one which did not allow the Union's majority status to be placed in question (*infra*, pp. 12a-13a). Chief Judge Bazelon would have remanded to the Board for reconsideration on the basis of the Trial Examiner's continuation ruling (*infra*, p. 48a). The majority, however, focused on the fact that the old employees did not constitute a majority at the new location and found no recognition duty (*infra*, pp. 43a-44a). The majority's doctrine is in basic conflict with two Labor Act doctrines dealing with change: the successorship and contract bar doctrines.

In the successorship situation the change which the employer claims relieves him of his duty to recognize the union is a change in the ownership of the plant. Under the successorship doctrine, the seller's duty to bargain with the incumbent union devolves upon the buyer so long as the operation remains basically unchanged (i.e., same product, machinery, methods of manufacture, jobs, etc.), *despite a substantial turnover in the composition of the bargaining unit.* E.g., *Firchau Logging Company, Inc.*, 126 NLRB 1215, 1221 (1960); *Colony Materials, Inc.*, 130 NLRB 105, 106 (1961). Cf. *Overnite Transportation Co.* v. *NLRB*, 372 F. 2d 765 (4th Cir. 1967). In some cases the turnover is so great that the old employees do not constitute a majority after the change in ownership. That fact has not, however, been regarded as ground for relieving the successor of the duty to recognize the incumbent union. *Krantz Wire & Manufacturing Co.*, 97 NLRB 971, 987 (1952) *enf'd sub nom. NLRB* v. *Armato*, 199 F. 2d 800 (7th Cir. 1952); *Firchau Logging Co., Inc.*, 126 NLRB 1215, 1221 (1960); *Howard Johnson, Inc. of New Jersey*, 135 NLRB 1260, 1268 (1962), *enf'd*, 371 F. 2d 1 (3d Cir. 1963), *cert. denied*, 375 U.S. 920.

In short, while (under this case) a failure of the old em-

ployees to constitute a majority after a change is grounds for relieving the employer of his duty to recognize the incumbent union where the change is a short relocation of the operation,[13] it is *not* where the change is a change in ownership.

The contract bar situation differs from the instant case only in that the relocation occurs during the term of the collective bargaining agreement and the question of the new employer's duty to recognize the union at the new location is raised not by the employer, but a rival union that files a petition for an NLRB election there. The rule in this situation is that, "a mere relocation of operations accompanied by a transfer of a considerable proportion of employees to another plant, without any accompanying change in the character of the jobs and the functions of the employees in the contract unit does not remove the contract as a bar" to the rival union's effort to question the incumbent union's majority. *General Extrusion Company, Inc.*, 121 NLRB 1165, 1167-68 (1958). See *The Arrow Company, a Div. of Cluett, Peabody & Co., Inc.*, 147 NLRB 829 (1946). Apparently the Board does not require that the old employees constitute a majority at the new location in order for the contract to bar an election, for in *Viewlex, Inc.*, 48 LRRM 1585 (1961), the Board's regional director applied the doctrine and refused to test the union's majority at the new location where the old employees numbered 28 in a work force of 96 at the new location; and in *Yale Rubber Manufacturing Co.*, 85 NLRB 131, 133 (1949), the Board refused to test the union's majority where the transferees from the old location were 70 in a work force of 150 at the new location.[14]

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[13] Accord, on this point, *Cooper Thermometer* v. *NLRB*, 376 F. 2d 684 (2d Cir. 1967).

[14] The Board did not appear to rely on "26 other former . . . employees who had left the Employer's employ at Yale of their own volition [and] had been reemployed at Sandusky at the date of the hearing." 85 NLRB at 133, n. 2.

It appears, therefore, that the old employees must constitute a majority at the new location if it is the employer that questions the union's majority there, while they need not if it is a rival union that raises the question and the contract is still in force.[15]

We ask the Court to grant certiorari so that the conflict in principle between the doctrine of this case and the Board's successorship and contract bar doctrines can be resolved.

As to Question No. 3
(*Supra*, p. 2)

The question of whether an employer who relocates his plant satisfies his bargaining duty if he insists throughout that at the new location he will not rehire old employees he considers lazy or guilty of misconduct in a strike at the old location is an important question of Labor Act law which has not been, but should be, decided by this Court.

The court below's decision that the Company did satisfy its bargaining duty under these circumstances is in conflict with the principle that, even after the collective bargaining agreement has expired, an employer cannot discharge employees unilaterally but must engage in collective bargaining on the matter. See *NLRB* v. *Katz*, 369 U.S. 736; *NLRB* v. *Exchange Parts Co.*, 339 F. 2d 829 (5th Cir. 1965); *Marine & Shipbuilding Workers* v. *NLRB*, 320 F. 2d 615, 620 (3d Cir. 1963), *cert. denied*, 375 U.S. 984.

In taking the position that, although it would consider applications for reemployment at the new location from old employees, it would not rehire there employees it considered physically incapable, lazy, or guilty of objectionable conduct in the strike at the old location (*infra*, p. 40a), the

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[15] In *Cumberland Shoe Corp.*, 156 NLRB 1130, 1134 (1966), old employees constituted less than a majority when the plant reopened after almost a year's shutdown, and the Board ordered recognition.

Company, in effect, discharged those employees. Though it later bargained with the Union concerning the employees it considered physically incapable, by offering to have them examined by an independent arbitrator, it never once swerved from its position that the employees it considered lazy or guilty of strike misconduct would definitely not be rehired.

It is clear that if the Company had taken this position at the old location—after the contract expired, but without benefit of the 35 mile movement of the plant—it would have been found guilty of an illegal refusal to bargain. See *United Nuclear Corporation,* 156 NLRB 961, 964-65 (1966), *enf'd,* 381 F. 2d 972 (10th Cir. 1967); *Miller Import Wholesale Beer Distributing,* 157 NLRB 1262, 1271 (1966). Discharge is the most serious action an employer can take with respect to an employee's terms and condition of employment and is a mandatory subject for bargaining. E.g., *NLRB* v. *Exchange Parts Co.,* 339 F. 2d 829 (5th Cir. 1965); *Assonet Trucking Co.,* 156 NLRB 350, 353 (1965). If a discharge occurs during the term of the collective bargaining agreement it must be bargained, and the parties normally do so by processing it through the contractual grievance procedure. See *Mayes Bros., Inc.,* 145 NLRB 181 (1963); Cf. *Jacobs Manufacturing Co.,* 138 NLRB 35, 57 (1962). If it occurs after the contract has expired it still must be bargained, either in the grievance procedure, which cannot be unilaterally eliminated despite the expiration of the contract, or in less formal negotiations concerning it. See *NLRB* v. *Katz,* 369 U.S. 736; *United Nuclear Corporation,* 156 NLRB 961, 964-65 (1966), *enf'd,* 381 F. 2d 972 (10th Cir. 1967); *Marine & Shipbuilding Workers* v. *NLRB,* 320 F. 2d 615, 620 (3d Cir. 1963), *cert. denied,* 375 U.S. 984.

We can conceive of no reason why the rule should be any different merely because after the contract expires the employer moves the plant. An employer who refuses to

recall his employees after an economic strike is guilty of an unfair labor practice. *NLRB* v. *Fleetwood Trailer Co.*, — U.S. —, 19 L. Ed. 2d 614; *NLRB* v. *Great Dane Trailers*, 388 U.S. 26. Should an employer who unilaterally refuses to rehire employees he considers lazy or guilty of misconduct in a strike be any better off merely because he has moved his plant 32 miles?

We submit that the rule of this case is dangerous, for it allows an employer, by the expedient of a short relocation, to rid himself of employees whose discharge he could not otherwise have made stick, either in the grievance procedure or less formal negotiations, despite the expiration of his union contract.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 4, 1968.

APPENDIX

The Trial Examiner's Decision

December 19, 1966

In this proceeding, under Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), the complaint [1] alleges that Respondent, in violation of Section 8(a)(5) and (1) of the Act, has failed and refused to bargain with the Charging Party (herein called UAW or the International) and its Local 940 (herein called the Local), as the joint collective bargaining representative of its employees and has refused to bargain with them over the effect on such employees of the removal of Respondent's plant from Anderson, Indiana, to Upland, Indiana.

Respondent answered, denying practically all the allegations of the complaint. A hearing on the issues so raised was held in Marion, Indiana, from February 28 to March 3, 1966, before Sidney D. Goldberg, duly designated as Trial Examiner herein, at which all parties were represented, afforded an opportunity to adduce evidence, cross-examine witnesses and argue upon the law and facts. Briefs subsequently filed by the General Counsel and by counsel for Respondent have been considered.

For the reasons hereinafter set forth in detail, I find that the International and the Local, jointly, were and are the collective bargaining representative of Respondent's employees in an appropriate unit and that Respondent has unlawfully refused to bargain with them concerning wages, hours, and other conditions of employment and, specifically, over the effect on such employees of the transfer of Respondent's operations from Anderson to Upland.

Upon the entire record in this proceeding [2] and the demeanor of the witnesses, I make the following:

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[1] Issued December 21, 1965, on a charge filed August 25, 1965, and an amended charge filed September 28, 1965.

[2] The following typographical errors in the transcript are hereby corrected: On page 11, line 9, the word "not" is changed to read "now" and on page 24, line 6, the word "provides" is inserted following the word "statute".

Findings of Fact

I. The employer

Respondent has been engaged for many years, formerly at Anderson and now at Upland, Indiana, in the manufacture and sale of automotive parts. Between 1957 and 1964, it was also the parent company in a complex of corporations but its manufacturing operation has continued unchanged for many years. It admits that, during the calendar year 1965, it imported materials valued at more than $50,000 and that it is engaged in commerce within the meaning of the Act. I so find.

II. The labor organizations involved

In 1941, the International was certified, by the Board's Regional Director for the Eleventh Region, as the "exclusive bargaining agency" of Respondent's production and maintenance employees.[3] Since that time there have been collective bargaining contracts continuously in effect between Respondent, as employer, and the International and its Local 940, jointly (herein called "the Union"), as the "exclusive bargaining agency" for the employees, the last one having expired October 30, 1964. Subsequent to that date and well into 1965, Respondent carried on negotiations for a collective bargaining contract with the Union. I find that the Union, as well as the International and the Local, are labor organizations within the meaning of the Act.

III. The unfair labor practices

A. *Background and chronology*

1. Introductory

Despite the volume of testimony herein—much of it pertaining to matters not truly in issue—the relevant facts of this case are not seriously in dispute. In view of the fact

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[3] Case No. XI-R-486. The unit is described as follows:

All production and maintenance employees excluding foremen, assistant foremen, superintendents, confidential, salaried, clerks, office and drafting room employees.

that the original charge herein was filed on August 25, 1965, any findings of unfair labor practices on the basis of Respondent's activities are limited, by Section 10(b) of the Act, to those which occurred on or after February 25, 1965, and the substantial amount of material in the record which deals with occurrences prior to February 25, 1965, was offered—and can be considered—only "to shed light on the true character of matters" occurring subsequent to that date.[4] There is also, unfortunately, a substantial amount of additional material in the record which deals with matters not in issue, either because they are not presented by the pleadings or because the matters themselves were never disputed.

2. Background

As stated, the Union was certified in 1941 and there were contracts between Respondent, as employer, and the Union, as the representative of the employees, in effect until October 30, 1964, when the last one was terminated by timely notice.[5] Bargaining, which had commenced prior to the terminal date of the contract, continued without satisfactory progress and, on November 6, 1964, the Union declared a strike, posting pickets at the plant, which was then still at Anderson. This strike was, at its inception, admittedly an economic strike and it was, at the time of the hearing of this proceeding, still in effect.

3. Chronology

Although the course of Respondent's bargaining with the Union and the process of its removal of its plant from Anderson to Upland have separate chronologies and could

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[4] *Local Lodge No. 1424, I.A.M. (Bryan Manufacturing Co.)* v. *N.L.R.B.*, 362 U.S. 411, 416 (1960).

[5] The contract which terminated October 30, 1964, described the unit as:

> . . . all the Company's employees, except foremen, assistant foremen, superintendents, confidential salaried office, Test Room, and Engineering Department employees, plant guards, and clerks, . . .

This unit, I find, was and is an appropriate unit for the purpose of collective bargaining.

be separately stated, they are contrapuntal in effect and such separate statements would, therefore, inadequately show their inter-relation.

The plant at Anderson consisted of a group of about six buildings, the oldest part of which had been built about 1900. Its dilapidated condition was notorious, so much so that one of the Union's key demands was a contract recognition of its right to strike over conditions of health and safety in the plant.[6] During the bargaining sessions in December 1964, references were made to the possibility that Respondent would construct a new plant, not necessarily at Anderson. At the negotiating meeting of December 16, 1964, part of which was taken down verbatim by a reporter, Respondent's chief negotiator, Donald F. Strutz, opened by stating that the Union's bargaining committee had brought the Company's attention to "the terrible defects of the plant including the odor problem, the heating problem, the leaking roof and the defective wiring and plumbing."[7] He stated that several communities had made offers to induce Respondent to move into them and that such offers had been given consideration. He noted that Upland, Indiana, within 40 miles from Anderson, had made the most attractive offer and that Respondent had concluded that it would be "economically advantageous" to move there. He suggested that the parties "temporarily discontinue negotiations on the new labor agreement to permit us to spend as much time as is required to negotiate fully the possibility of the Company making such a move." He also stated that "should such a move be made, each employee will be given full consideration for reemployment if he

[6] It was stipulated that, as of September 1, 1964, "the physical condition of the plant at Anderson, Indiana, had deteriorated to a point where the continued operation without proper repair and remodeling created unsafe and unhealthful working conditions which the Union requested be remedied. This resulted in the Union demand that a failure to repair the unsafe conditions of the plant within twelve days' notice thereof would become the subject of a right to strike, health and safety grievances for the duration of the proposed labor agreement. That such strike must be approved by the Regional Director of the UAW-CIO."

[7] The accuracy of the written report is not questioned by any party herein.

presents himself to the new plant and if hired, will retain his full seniority." With respect to recognition of the Union as the collective bargaining representative of the employees at Upland, however, he stated that such recognition would be dependent upon proof of such representation.

The Union's spokesman, International Representative Ray Shetterly, expressed surprise at the Company's announcement, stating that he had supposed they were bargaining for a contract at the Anderson plant to take the place of the one which had expired, and he called for a recess to discuss this new development with his bargaining committee. After the recess, the meeting resumed without the reporter. Shetterly made it clear that the Union wished to bargain for an agreement on two subjects: (i) the operation of the plant at Anderson as long as it remained there and (ii) the effect on the employees of a transfer of the Company's operations to any other community. Respondent then stated the terms of a contract it would sign covering the interim operation of the Anderson plant. These included the right to terminate such agreement on 30 days notice of the Company's election to locate its plant outside Anderson and the removal of any restrictions on subcontracting, avowedly "to facilitate removal of plant."

Several meetings were held, later in December and through January, without significant progress, although the parties went to the extent of "changing faces" on both sides of the table in an effort to ease the rigidities rooted in personal antagonisms between the principal negotiators on both sides.[8] Bargaining on the subject of an interim contract continued, without success, until it became academic by Respondent's removal of the plant to Upland.

Toward the end of December, 1964, Respondent ceased

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[8] The documentary evidence clearly shows an unfortunate tendency, on both sides, to permit themselves to be diverted from the main problem and to quibble and quarrel over matters irrelevant to it. Moreover, both the documents and the testimony herein indicate that one of Respondent's major efforts in connection with the contract negotiations was to eliminate the necessity of dealing with International Representative Shetterly and the members of the negotiating committee.

its efforts to carry on production in the face of the strike and shut down the Anderson plant. At about the same time, it completed its arrangements for relocating at Upland and let a contract for construction of a new building there. Pending completion of the new building, Respondent began production in rented quarters at Upland, using supervisory personnel. During the month of January 1965, the first of those in the clerical and supervisory force of Respondent who were willing to move to Upland, did so and by July all of these—about 85 percent of that force at Anderson—had made the move.

Transfer of normal production to Upland was slower. The order to begin construction was given on December 31, 1964, and work on the foundation actually began on January 4, 1965, but Respondent was not able to move into the building until April. The first few production employees at Upland were hired during February and it was estimated that, at the end of April, Respondent still had fewer than 100 employees there. This number increased slowly through May and June and, it was stipulated, the number of production employees in the Upland plant during the week prior to July 4 was something under 153. It was also stipulated that this number continued to move upward until it reached 212 at the end of August and that there have been in the plant at all times since August 1, at least 190 production and maintenance employees. Only one of the production employees who worked at the plant at Anderson—and that one hired after the strike began—has worked at the plant at Upland.

One of the January meetings, that on the 26th, was held in the office of the Federal Mediator in Indianapolis. Respondent was represented by its president, Leland E. Boren, its vice president for labor relations, Leroy V. Bradnick, and its "corporate" counsel, Thomas D. Logan.[9] The Union was represented by Shetterly and by Raymond H. Berndt,

[9] Mr. Logan is a member of the law firm which represents Respondent. Its name was, at that time, Rothberg, Gallmeyer, Strutz, Fruechtenicht & Logan and its senior partner, Sol Rothberg, was a member of Respondent's Board of Directors. Donald F. Strutz was also a member of the firm at that time but he thereafter severed his association with it, continuing, however, to act as "labor counsel" for Respondent.

the Regional Director of UAW's Region No. 3. After a fruitless morning discussion, Logan and Berndt met alone in Berndt's office in the afternoon. Logan testified that he told Berndt that he had no authority to bind Respondent and had been at the meeting only because Strutz was in Florida. Logan pointed out that conditions at Upland were not the same as at Anderson and Berndt gave him a copy of a contract between UAW and another employer so that he could become familiar with its general contents.

Two days later, after conferring with Respondent's officials, Logan wrote Berndt a 6-page letter, practically all of which consisted of a statement of "the principles generally acceptable" to Respondent. One of these "principles" consisted of a proposed contract provision entitled "Seniority," which set forth, in detail, job titles, groupings of employees, entry rates of pay and the automatic increases that would be effective after 60 and 90 days, respectively.

At its beginning, this letter from Logan referred to the recent meeting of the parties and it then continued as follows:

> . . . As I indicated then, I want to preface our communications with a restatement of our position. That we are not obligated to recognize Local 940 and are unwilling to recognize them for any purposes pertaining to employment at any location other than that at Anderson. However, we are willing to discuss the possibility of being able to enter into an agreement with some union at the Upland location. If we could arrive at some agreement with you, I think we would be willing to make that applicable to whatever local you think best and recognize as much as we can the equities of employees who have been employed at the Anderson plant.

The letter closed with the following:

> . . . Thanks again very much for the meeting of yesterday, I am willing to formulate a complete contract if these thoughts are consistent basically with yours.
>
> Again the Company has cautioned me to say that they are not willing to recognize Mr. Shetterly and his bar-

gaining committee to arrive at any conclusion about Upland, but they will look favorably upon a contract with United Auto Workers if that can be suitably arranged between them.

It seems to me that you might then propose a formal contract which I promise to take up immediately with the Board and give you a report.

Berndt did not answer until February 15, but he explained that he had been ill and stated that he hoped, within the next few days, to comment on Logan's letter of January 26, "point by point" and to advise him further "with respect to the basic suggestions . . . relative to UAW recognition" at the Upland plant.

On March 9, Logan again wrote to Berndt, noting that six weeks had passed since his letter of January 28 and that Berndt had not written as he had promised in his letter of February 15. "Accordingly," Logan's letter stated, "I am instructed by my client to withdraw the suggestions made in said letter and to revert to our former position." The following day, Berndt telegraphed Logan, stating that his detailed answer had already been prepared and would be in the mail by noon.

Berndt's letter indicated acceptance, at least in principle, of most of Respondent's proposals. He pointed out, however, that the proposed wage rates were "unacceptable" to the Union and noted that it was the prerogative of the International both to designate the local that would cover specific bargaining units and to assign the representatives it thought best to assist such locals. He suggested that they meet in an effort to settle the dispute.

With these letters, communications between Logan and Berndt appears to have terminated.

During the month of June, 1965, representatives of the Union and Respondent met at a hearing involving the unemployment insurance benefits of the striking employees. They discussed and settled questions concerning retired employees and talked briefly about the status of the Union and of the strike. Shetterly restated the Union's position: that the striking employees were still the employees of the

Company [10]; that Local 940 was their only representative [11] and that all of those willing to go to Upland should be offered employment there. Shetterly also said that if the Company had questions about the physical capacity of some of the employees to perform their work, those questions should be resolved through examination by an independent medical clinic. Strutz countered by pointing out that there were some employees who had been considered "substandard" at Anderson because they either could not or would not produce a reasonable day's work; he agreed that there should be some objective standards for determining which of these should be offered jobs at Upland and he suggested that it be done through an independent arbitrator. Shetterly promised to discuss this with his superiors.[12] They also discussed the probable number of striking employees who would desire employment at Upland and they "guessed" that, after eliminating those who had reached retirement age, those who could not pass physical tests and those who had obtained other satisfactory employment, only 40 or 50 go to Upland.

Representatives of the parties again met about August 17 in connection with the unemployment compensation hearings and again they also discussed the controversy between them. As a result, Shetterly wrote Strutz asking for a meeting to bargain concerning the transfer rights of the striking employees and recognition of the Union at the Upland plant. There was no answer to this letter and, after a second letter was ignored, Shetterly wrote on September 15 to President Boren, requesting a meeting.

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[10] At the unemployment compensation hearing, Vice President Bradnick testified that at the end of March the striking employees could have resumed work at the Anderson plant since almost all of the machinery was still intact and in place.

[11] There is nothing to suggest that Shetterly meant to imply that there was a distinction between Local 940 and the joint local-international representative that is referred to herein as the Union.

[12] Shetterly subsequently telephoned Strutz and stated that, if the Company insisted that some employees meet "objective" standards as determined by an arbitrator before they could have transfer rights, the Union could not agree.

Boren answered: his letter, dated September 17, stating in part:

> It is our position that under the law and the contract which expired October 31, 1964, the employees at Anderson who continue on strike against the plant, have no rights concerning re-employment at the Company's Upland plant.

He offered to meet with the Union but insisted that Respondent was not obligated to bargain "concerning transfer rights which do not exist."

Shetterly's reply suggested that a meeting be held during the week of October 11, or any other convenient date. This time Strutz answered: he did not fix a date for meeting but restated Respondent's refusal to bargain concerning transfer rights. A subsequent letter from Shetterly again requesting a meeting to bargain about transfer rights was again answered by a letter from Strutz offering to meet at anytime but not stating the subject of such meeting. This letter also stated:

> Again please permit me to state the Company's position concerning bargaining for its employees at Upland, Indiana. Until such time as you may become the certified bargaining agent of our employees at Upland or at such time as we are convinced that you represent the majority of our employees at Upland, we cannot consider your request for bargaining.

Just prior to Thanksgiving in 1965, Strutz met with Shetterly and Roy Cantrell, Assistant Regional Director of the UAW, in the Federal Mediator's office at Indianapolis. They discussed the strike situation at Anderson and Shetterly noted that there were still about 40 people drawing strike benefits and that these employees, if physically capable of working, as well as some of those who were working in Muncie,[13] would probably wish to take jobs at Upland. Shetterly then proposed: (i) that with respect to

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[13] About 20 miles northeast of Anderson. Upland is about 32 miles north-northeast of Anderson.

those employees of the Anderson plant claimed by Respondent to be unable to perform their jobs, physical examinations be conducted by a competent medical clinic in Indianapolis and the employees be approved or disapproved on the basis of comparison with normal persons of their same age; (ii) that with respect to the other employees, whose physical capacities were not in question, they be given rights to jobs at Upland, "bumping," where necessary, others hired there; (iii) that the UAW be recognized as the collective bargaining representative of the employees at Upland and a contract be negotiated with it to cover wages and working conditions.

Shetterly assured Strutz that it was not essential that Local 940, as an entity, continue to be, at Upland, the "local" part of the joint representative of the employees there but that, after an agreement had been reached with the International covering the Upland plant, a new local could be established and an election scheduled at which the Upland employees could select their own bargaining committee.

A final meeting was held in February, 1966, at which the spokesmen for each of the parties professed to be waiting for an offer from the other. No further meeting had been held prior to the hearing of this proceeding.

B. *Discussion and Conclusions*

1. The issues

Although the facts in this case are undisputed, there is a large amount of evidence in the record that is immaterial—either because its subject was never in dispute or because it was not presented by the pleadings—and an additional amount of evidence which, when the basic issues in this case are delineated, may be found to be immaterial to them.

The major causes for the confused and encumbered condition of the record are, in my opinion, the General Counsel's pre-occupation with "background" evidence not necessary to this case[14] and Respondent's efforts to litigate

[14] As shown below, Respondent's good faith, or lack thereof, is irrelevant.

matters that are neither disputed nor issues herein.[15] The complaint, after setting forth background matter designed to show bad faith bargaining by Respondent during the period prior to the 10(b) date, alleges that, since February 25, 1965, Respondent has refused to bargain with the Union as the collective bargaining representative of its plant employees (i) concerning wages, hours and other terms and conditions of employment and (ii) concerning the effect on its employees of the removal of the plant from Anderson to Upland. Whether Respondent's conduct constitutes a refusal to bargain in these broad terms is, I am convinced, the basic issue herein and, while there are several narrower questions presented, they are subsidiary to the main one.

2. Discussion

At the commencement of consideration of this case, certain undisputed facts must be noted: (i) except for the removal of its plant location from Anderson to Upland, there has been no change in Respondent's business: its corporate status, its ownership, its top management, its clerical and supervisory personnel are all unchanged and its product is precisely the same; (ii) the new location of the plant, at Upland, is about 32 miles from Anderson through relatively open countryside with no large settlements or obstacles but with several paved roads between them[16] and, therefore, both locations are within the same general community.

On the basis of these facts, it seems clear that the removal of the plant from Anderson to Upland had no greater significance, in this context, that would have had its removal across the street and, therefore, that the move effected no

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[15] Despite Respondent's attempts, both during the course of the bargaining and in this proceeding, to turn to its advantage the concededly dilapidated condition of the plant by endeavoring to make an issue of the necessity to move, the Union waived its right to bargain on this subject and the lack of bargaining thereon is not an issue herein.

[16] The absence of large settlements and existence of paved roads are judicially noticed on the basis of the 1965-1966 map of the Indiana Highway Commission. In addition to the one or more paved roads that are fairly direct, Interstate Highway 69, an access-controlled, multi-lane, divided highway, has an access point less than 5 miles from Anderson and another, about 25 miles north, less than 3 miles from Upland.

substantial change in the status or obligation of Respondent toward its employees or their bargaining representative, the Union.[17]

Respondent's position with respect to recognition of the Union as the joint collective bargaining representative of its employees, both those formerly at Anderson and those subsequently employed at Upland, is not completely clear on the record. While Boren's letter of September 17, 1965, states:

> It is our position that under the law and the contract which expired October 31, 1964, the employees at Anderson who continue on strike against the plant, have no rights concerning re-employment at the Company's Upland plant . . .

Logan's letters dated January 28 and March 9, 1965, stated that Respondent was "not obligated to recognize Local 940 and are unwilling to recognize them for any purpose pertaining to employment at any other location other than Anderson."[18]

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[17] In *International Paper Company*, 150 NLRB 1252, the employer moved certain of its operations from one of its plants, located on the south side of St. Louis, to another one which was located on the north side of the same city. The Board adopted the Trial Examiner's findings, based in part upon the fact that both plants are in the same metropolitan area, that the employer's refusal to recognize, for certain employees at the north plant, the Union which had represented them at the south plant, violated Section 8(a)(5) of the Act. To the same effect, see: *Jack Lewis et al. d/b/a California Footwear Co.*, 114 NLRB 765, enforced as modified in other respects, 246 F. 2d 886 (C.A. 9), in which removal of the employer's plant from downtown Los Angeles to Venice, a part of the same city about 12 miles away, was held not to affect its obligations; *Rapid Bindery Inc.*, 127 NLRB 212, enforced as modified in other respects, 293 F. 2d 170 (C.A. 2), in which the employer's transfer of operations from Dunkirk, N. Y., 44 miles south of Buffalo, to Tonawanda, N. Y., about 10 miles north of Buffalo, was also held not to affect its obligation; *N.L.R.B. v. Storack Corp.*, 375 F. 2d 893 (C.A. 7) in which the Court of Appeals, enforcing the Board's bargaining order (147 NLRB 493), declined to give any weight to the employer's removal of its plant from Evanston, Ill., to the southern part of Chicago, a distance of between 25 and 35 miles.

[18] Another version of Respondent's position is the statement, also set forth in Logan's letter of January 28, 1965, that "the Company . . . are not willing to recognize Mr. Shetterly and his bargaining committee to arrive at any conclusion about Upland . . ."

Respondent's brief, in listing the issues believed to be raised by the pleadings and evidence herein, includes the following:

> 5. Is the Company legally obligated to recognize either the International Union or its Local 940 at Anderson, Indiana, or both of them, as the exclusive collective bargaining representative for its production and maintenance workers at Upland, Indiana, without a prior representation election to enable its Upland employees to select a representative of their own choosing.

and the recommended answer to this question is stated in the negative because, according to its brief, Respondent offered—and the Union refused—to bargain the question of plant removal.

3. Conclusions

Whether stated as a denial of transfer rights to its Anderson employees, a refusal to recognize Local 940 for any purpose other than as the representative of the "Anderson" employees or a refusal to bargain with "Mr. Shetterly and his bargaining committee," it is clear that Respondent has refused, and continues to refuse, to bargain with the Union as the collective bargaining representative of its production and maintenance employees.

But on November 6, 1964, when the Union went on strike in support of its efforts to obtain a satisfactory contract, all of the 186 permanent employees in the unit were members of Local 940. From the beginning of discussions involving a new plant, however, Respondent took the position that at any new location it would refuse to recognize Local 940 as a segment of the joint local-international representative which had long been the chosen collective bargaining representative of its employees. According to the uncontradicted testimony of Bradnick, this position was first stated by Strutz at the bargaining conference on December 16, 1964, when the probable removal of the plant was first openly discussed, it was repeated by Strutz at the meeting of January 6, 1965, and again stated by Logan at the meeting on January 26, 1965. Finally, Logan's letter of January 28,

1965, quoted above, sets forth Respondent's refusal to recognize Local 940 as an unchangeable element in its position [19] and it is clear from the record that this refusal continued unabated down to the time of the hearing. I am unable to find, either in the record or in Respondent's brief, an intelligible argument in support of this position.

This position was and is, in my opinion, unjustifiable. While it was the International which was certified in 1941 by the Board, there is no obstacle to the joint representation of employees in an appropriate unit by more than one labor organization,[20] and it is clear that it was Local 940 to which, it was stipulated, all of the employees in the unit belonged. Accordingly, on the basis of the International's certification and continuous representation of Respondent's employees and on the basis of Local 940's status as the continuous representative and the designee by membership of these same employees, it is clear that the International and the Local constituted the single, joint representative of the employees [21] and Respondent's effort to sever the local from the international cannot succeed. Respondent has been, and is, obligated to bargain with them in the form which has been chosen by the employees,[22] notwithstanding the termination of the previous contract [23] or the commencement and pendency of the strike.[24]

The specific subjects, however, upon which bargaining was necessary (within the general area of "wages, hours, and other terms and conditions of employment" set forth in Section 8(d) of the Act) varied during the course of the period here involved, depending upon changes in circumstances.

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[19] This refusal, of course, was not one of the "suggestions" which was "withdrawn" by Logan's letter of March 9, 1965, and in subsequent conferences Respondent made clear its continued refusal to recognize Local 940.

[20] *General Motors Corporation*, 67 NLRB 233.

[21] The article of the 1961-1964 contract entitled "recognition" designates Local 940 and the International as "the exclusive bargaining agency" for Respondent's employees in the described unit.

[22] *The Ingalls Shipbuilding Corporation*, 143 NLRB 712.

[23] *Winn-Dixie Stores, Inc.*, 147 NLRB 788, enforced as modified, 361 F. 2d 512; (C.A. 5; May 19, 1966).

[24] *Pecheur Lozenge Co., Inc.*, 98 NLRB 496, enforced as modified, 209 F. 2d 393, 403, (C.A. 2; 1953), cert. denied 347 U.S. 953.

During the period from the start of the strike (actually, from this time of notification of termination of the previously existing contract) until about December 16, 1964, the subject of bargaining was, generally speaking, the terms of a contract covering employment at the Anderson plant. Beginning about December 16, 1964, however, when Respondent first clearly stated that removal of the plant was under serious consideration, proper subjects of bargaining included: (i) whether the plant should be moved; (ii) the terms of an interim contract covering operation of the Anderson plant pending final decision on such removal and (iii) the effect on the employees of such removal, if accomplished.

With Respondent's definite decision, at the end of 1964, to terminate its operations at Anderson and move to Upland, any further discussion with the Union over whether the plant should be moved or concerning the terms of an interim contract an Anderson became futile but Respondent's basic obligation to bargain with the Union remained unaffected by the decision since, as set forth above, both the operation of the Company and its location remained relatively unchanged. But with the change in circumstances resulting from the decision to move, the aspects of Respondent's obligation to bargain which became paramount during the period which began with 1965 were those concerned with: (i) the terms and conditions of employment at Upland and (ii) the effects of the plant removal on the employees. These are the matters upon which the Union has continuously insisted that negotiations be held and upon which Respondent, by insisting that it will not negotiate in any manner with Local 940, has precluded such negotiations.

It is clear, therefore, on this record that Respondent, by continuously refusing to recognize and bargain with Local 940 as an integral part of the bargaining agent of its employees, has violated Section 8(a)(5) of the Act by its refusal to recognize and bargain with the joint bargaining representative which it was required by the Act to recognize.[25] The question of good faith, moreover, is irrelevant in this case since the duty to bargain herein arises out of

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[25] Even if Respondent's conduct had been confined to an effort to rid itself of Shetterly and the negotiating committee, such conduct would

the undisputed relationship between the parties and the subjects upon which the Union has sought to bargain—and the Respondent has refused—are clearly mandatory subjects of bargaining.[26]

Moreover, Respondent's continued refusal to discuss the treatment to be accorded employees adversely affected by the removal of the plant to Upland was, in itself, a violation of Section 8(a)(5) of the Act.[27]

Although these refusals to bargain began prior to February 25, 1965, any finding of violation of the Act herein must be based upon activities subsequent to that date. Accordingly, I find that Respondent's unfair labor practices in violation of Section 8(a)(5) of the Act commenced on February 25, 1965, and have continued since that date.

Respondent's unalterable refusal to recognize Local 940, in any meaningful way, as an integral element of the collective bargaining representative of its employees has been, I find, the principal obstruction to bargaining since February 25, 1965. Its unlawful conduct has been the major impediment to bargaining and has thereby largely contributed to the continuation of the strike. Accordingly, since February 25, 1965, the strike of Respondent's employees has been an unfair labor practice strike,[28] and the employees who had not been theretofore permanently replaced have retained their status as employees and their right to reinstatement upon their unconditional application to return to work.[29]

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in section III, occurring in connection with the operations of Respondent described in section I, have a close, intimate and substantial

constitute violation of Section 8(a)(5) of the Act, (*American Radiator & Standard Sanitary Corporation,* 155 NLRB No. 69).

[26] *N.L.R.B.* v. *Katz etc.,* 369 U.S. 736.

[27] *Rapid Bindery, Inc.,* 127 NLRB 212, enforced on this point, 293 F. 2d 170 (C.A. 2; 1961); *Royal Plating and Polishing Co., Inc.,* 160 NLRB No. 72.

[28] *The Philip Carey Mfg. Co.,* 140 NLRB 1103, 1105-6; enforced on this point, 331 F. 2d 720 (C.A. 6; 1964).

[29] *Mastro Plastics Corp.* v. *N.L.R.B.,* 350 U.S. 270, 278; *The Philip Carey Mfg. Co., supra; Hawaii Meat Company, Ltd.,* 139 NLRB 966.

relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found herein that Respondent has engaged in, and is engaging in, unfair labor practices, it will be recommended that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, I will recommend that the Respondent, upon request, bargain collectively with the Union as such representative and, if an understanding is reached, embody such understanding in a signed agreement.

Having found that the strike, which commenced as an economic work stoppage on November 6, 1964, was converted into an unfair labor practice strike on February 25, 1965, by Respondent's unlawful refusal to bargain with the Union and was thereafter prolonged by Respondent's unfair labor practices, and having found that the employees who went on strike and after February 25, 1965, became unfair labor practice strikers as a consequence thereof, I will recommend that Respondent, upon application, offer them reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any person hired after the latter date, and make these employees whole for any loss of pay they may suffer as a result of Respondent's refusal to reinstate them upon such application.

Upon the foregoing findings of fact, and upon the entire record herein, I reach the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 940 and the International are labor organizations within the meaning of Section 2(5) of the Act.

3. The Union, consisting of Local 940 and the International, acting jointly, is a labor organization within the meaning of Section 2(5) of the Act.

4. All of Respondent's employees, except foremen, assistant foremen, superintendents, confidential salaried office, test room, and engineering department employees, plant guards and clerks, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times since February 25, 1965, the Union has been the representative, for collective bargaining purposes, of Respondent's employees in the unit above described.

6. By failing and refusing to bargain with the Union on and after February 25, 1965, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act and has thereby interfered with, restrained, and coerced, employees in the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) thereof.

7. By engaging in the aforementioned unfair labor practices, the Respondent converted the Union's economic strike into an unfair labor practice strike on February 25, 1965, in consequence of which the employees who were on strike on and after that date retained their status as employees and have continued to be entitled to reinstatement, upon application, to their former or substantially equivalent positions in preference to all employees hired since that date.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that The Pierce Governor Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and Local Union No. 940 thereof, acting jointly, as the collective bargaining representative of its employees in the unit described as follows:

> All employees, except foremen, assistant foremen, superintendents, confidential salaried office, test room and engineering department employees, plant guards and clerks.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain with International Union, United Automobile, Aerospace & Agricultural Workers of America, AFL-CIO and Local Union No. 940 thereof, jointly, as the collective bargaining representative of its employees in the appropriate unit described above with respect to rates of pay, hours of employment and other terms and conditions of employment and with respect to the effect upon the employees in the unit of the removal of its plant from Anderson to Upland and, if an agreement is reached, embody such agreement in a signed contract.

(b) Upon their unconditional offer to return to work,

reinstate all employees in the unit who were on strike on and after February 25, 1965, to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging, if necessary to effect such reinstatement, persons employed subsequent to that date and make each such employee whole for any loss of pay he may suffer as a result of its refusal to reinstate him upon such application. The backpay, if any, will be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289, with interest thereon at 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

(c) Notify any and all employees in the aforesaid unit who were on strike against it on and after February 25, 1965, and who are now serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay that may become due under the terms of this Order.

(e) Post at its plant at Upland, Indiana, copies of the notice attached hereto and marked Appendix.[30] Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being signed by its representative, be posted and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reason-

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[30] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "DECISION AND ORDER."

able steps shall be taken to insure that said notices are not altered, defaced, or covered by any material.

(f) Notify the Regional Director for the Twenty-fifth Region in writing, within 20 days from receipt of this Decision, what steps it has taken to comply herewith.[31]

Dated at Washington, D. C. September 19, 1966.

/s/ SIDNEY D. GOLDBERG,
Trial Examiner.

[31] In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

The National Labor Relations Board's Decision

April 24, 1967

On September 19, 1966, Trial Examiner Sidney D. Goldberg issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with this Decision and Order.

The Trial Examiner found that Respondent, commencing February 25, 1965, the first day of the Section 10(b) period,[1] violated Section 8(a)(5) of the Act by continuously refusing to bargain with Local 940[2] "as an integral part" of the joint bargaining agent as to (1) the effects of the removal of Respondent's plant from Anderson to Upland, Indiana, and (2) the terms and conditions of employment at the Upland plant. In addition, the Trial Examiner found that

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[1] Section 10(b) provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

The initial charge in the instant case was filed on August 25, 1965.

[2] Although only the International was certified in 1941 for the employees at Respondent's Anderson, Indiana, plant, both the International and its Local 940 have since jointly negotiated agreements with Respondent.

the economic strike, which began at Anderson on November 6, 1964, was prolonged by the 8(a)(5) conduct and was therefore converted to an unfair labor practice strike on February 25, 1965. We do not agree with these findings of the Trial Examiner.

As noted above, the International was certified in 1941 as the bargaining representative of production and maintenance employees at the Anderson, Indiana, plant of Respondent. Thereafter, Respondent negotiated with the International and Local 940 a series of agreements, the most recent of which was terminated by timely notice on October 30, 1964. In the absence of satisfactory progress in bargaining, the Union on November 6, 1964, initiated a strike, which was admittedly economic at its inception, and posted pickets at the Anderson plant.[3]

The parties continued negotiations at meetings on November 16 and 20, and December 2 and 8, 1964, but it was not until the meeting of December 16, 1964, that Respondent brought up the subject of moving its Anderson plant to a new location. At that time, Respondent's chief negotiator, Donald F. Strutz, referred to the Union's earlier criticism of the Anderson plant as "unsafe and unhealthful" and stated that Respondent concluded it would be "economically advantageous" to move about 40 miles away to the community of Upland, Indiana. Strutz then suggested a temporary cessation of negotiations on a new bargaining agreement to permit the Company to talk with Upland officials about making the move. Strutz added that should the move be made, each employee presenting himself at the new plant would be given full consideration for reemployment and, if hired, would retain his seniority. With respect to recognition of the Union as the bargaining representative of the employees at Upland, Strutz stated that recognition would be dependent upon proof of representation.

International Representative Raymond Shetterly expressed surprise at Respondent's announcement, and, after conferring with other officials of the Union, stated that the Union wished to bargain for an agreement on (1) the operation of the Anderson plant so long as it remained at that

[3] Pickets were later stationed at Upland.

location and (2) the effects on the Anderson employees of a transfer of the Company's operations to any other community.

The parties met again on December 22, 1964, and discussed a contract for the Anderson plant. When the Union proposed a provision prohibiting removal of the plant during the life of such a contract, Respondent conditioned its agreement to this proposal on a provision giving Respondent the right to terminate such a contract upon 30 days' notice of its election to locate the plant outside Anderson. Shetterly then asked that Respondent "guarantee" the transfer of *all* Anderson employees to the new location. In reply, Respondent renewed its offer of December 16 to give consideration to Anderson employees who applied at the Upland plant for employment, with retention of seniority for all those hired. In refusing to guarantee the transfer of all Anderson employees, Respondent took the position that (1) certain employees were physically unable to do a full day's work because of age, (2) other employees, albeit physically able, had not been "delivering a fair day's work," and (3) still others had become unfitted for further employment with Respondent because of their attitude during the strike. The parties then specifically referred to and discussed several employees in the first category.

The next bargaining session was held on December 31, 1964. Shetterly offered to have the Union bring in an "economic proposal to hold the [Anderson] plant in town". In reply, Respondent advised the Union that it had already directed a contractor to start construction of a new building at Upland on January 4, 1965.[4] In the course of bargaining, the parties reached a tentative agreement on the terms of a seniority provision which dealt with various aspects of that subject. Shetterly renewed the Union's demand for a

[4] The new plant became aavilable for occupancy in April 1965. However, Respondent began production about January 1965 in rented quarters at Upland. Except for one production employee, who had started work at Anderson during the strike, it appears that Respondent staffed the Upland location with newly hired production and maintenance employees, their number increasing from a few in February to 100 at the end of April, about 153 by early July, 212 at the end of August, and at least 190 at all times since August 1965.

Respondent guarantee of transfer rights for all Anderson employees and Respondent again offered to consider for employment any applicants from Anderson and to preserve the seniority of those selected. In addition, Respondent stated its willingness to give severance pay to those who were not hired. Respondent also assured Shetterly that as of that time no jobs had been "promised" to the town of Upland. The meeting ended without resolution of the transfer issue.

The parties met again on January 9, 1965, when the Union was represented by International representative Carl Parker and the Local 940 bargaining committee. Parker, who indicated that he did not want to bargain for an interim contract for the Anderson plant, asked Respondent to bargain on pay rates at the Upland plant. Respondent replied that it was not obligated to bargain with the Union concerning pay rates for Upland employees who had a right to choose their own bargaining agent. Parker then insisted on going down the Anderson seniority list and discussing "person by person" who would be going to Upland. Respondent refused to do so, explaining that it had no information on how much business it would have at Upland. However, Respondent reiterated its earlier offer to give consideration to Anderson applicants with seniority for those hired and separation pay for employees not transferred.

The next meeting was held on January 19, 1965, in the presence of a Federal Mediator, with Respondent represented by its Vice President, LeRoy V. Bradnick, and the Union by Shetterly and the Local 940 bargaining committee. The parties decided that further negotiations were useless and agreed to the Mediator's suggestion that they designate subcommittees which excluded Bradnick and Shetterly.

Such subcommittee meetings were held on three successive days in the latter part of January 1965, with the Federal Mediator present on the latter two occasions. On January 20, considerable time was spent by Respondent representatives convincing the subcommittee of three Anderson employees that Respondent was serious in its intention to move the plant to Upland. The employee subcom-

mittee then demanded a discussion of each employee on the Anderson seniority list to ascertain those desiring to go to Upland. When two members of the employee subcommittee stated that they would under no circumstances transfer to Upland, Joseph E. McDonald, Respondent Treasurer and Assistant Secretary pointed out that "it seemed ridiculous" to go down a seniority list of 180 employees to discuss the prospects of those Anderson employees who would not be interested in a transfer.

On January 21, Respondent offered immediately to declare the Anderson plant closed in order to enable the employees to draw unemployment compensation. Respondent also offered to go to the "Federal Unemployment Service" to try to secure other jobs for the Anderson employees under what is known as the "Studebaker System". Respondent stated further it would attempt to increase severance pay for Anderson employees by using for that purpose the surplus in the pension fund. On January 22, the employee subcommittee informed Respondent that its proposals were unacceptable. An understanding was then reached by the parties that any future meetings would be called through the Federal Mediator.

The next meeting was held at the office of the Federal Mediator on the morning of January 26, 1965, at the request of Shetterly who advised Respondent that the Regional Director of UAW Region 3, Raymond H. Berndt, would like to meet with Respondent's President, Leland E. Boren. Representing Respondent were Boren, Bradnick, and Thomas D. Logan, the Company's "corporate" counsel. The Union representatives were Shetterly and Berndt. Logan stated that he had no authority to bind Respondent in the absence of Strutz who was in Florida. According to Shetterly, Boren told him that "Local 940 could not bargain for the people in Upland . . . that . . . Shetterly couldn't be the representative that negotiated the contract in Upland, and . . . the people in Anderson would not be given transfer rights as such."[5] After two hours of discussion, the meet-

[5] According to Boren, Shetterly stated that while the latter did not expect Respondent to transfer all Anderson employees to Upland, "Respondent must go through the seniority list" to bargain with respect to the suitability of each Anderson employee for Upland employment.

ing ended at noon with Berndt indicating that "nothing much was being accomplished", and suggesting a meeting after lunch between him and Logan. At their afternoon meeting, Logan and Berndt agreed that neither of them was in a position to talk about particulars but would explore the issues on a purely personal basis in the hope of coming up with solutions that might later be useful. Berndt stated, and Logan agreed, that the "economic make-up" of the Upland area and its distance from Anderson were such that it was a mistake to let the negotiations "bog down" in a discussion of transfer rights. Berndt then expressed the opinion that the "important thing" was representation by "some local of the UAW." Logan replied that he could see the advantages of UAW representation and suggested that they talk along that line, keeping in mind that it was relatively academic to discuss transfer rights in view of Berndt's opinion that very few of the Union employees at Anderson would care to come to Upland. They proceeded to discuss the possibility of a contract *without* a provision concerning transfer rights and *with* a new UAW Local. The meeting concluded with Berndt handing Logan for his study a copy of a contract that the UAW had with another employer in Huntington, Indiana. A day or two later, Berndt telephoned to asked Logan to send a letter confirming their conversation.

On January 28, 1965, Logan wrote Berndt a lengthy letter which began with the following "restatement of . . . position";

> That we are not obligated to recognize Local 940 and are unwilling to recognize [it] for any purposes pertaining to employment at any location other than that at Anderson. However, we are willing to discuss the possibility of being able to enter into an agreement with some union at the Upland location. If we could arrive at some agreement with you, I think we would be willing to make that applicable to whatever local you think best and recognize as much as we can the equities of employees who have been employed at the Anderson plant.

Logan then indicated Respondent's willingness to recognize "a UAW-CIO Local at Upland" for a 5-year contract. However, Logan cautioned Berndt that Respondent was "not willing to recognize . . . Shetterly and his bargaining committee" with respect to Upland.

In addition, Logan stated that Respondent "will bargain [sic] each individual on the seniority list for employment at Upland, taking into account (1) their qualifications for the work, (2) physical condition, (3) mental outlook and attitude, (4) absentee record, and (5) job openings." Logan also expressed Respondent's willingness to give severance pay to all employees with a minimum of 10 years service if they desired employment at Upland but were not selected therefor. The letter further proposed a contract provision setting forth, in detail, job titles, entry rates of pay, and subsequent automatic increases. Finally, Logan stated, "you might . . . propose a formal contract which I promise to take up immediately" with the Company's Board of Directors.

On February 15, 1965, Berndt wrote Logan that his reply had been delayed until that date because he had been out of town for about a week and was ill the following week. Berndt expressed his appreciation of Logan's "recognition of the problem existing with respect to . . . [the] employees at [the] Anderson plant and their plight in your moving . . . to a new plant at Upland . . . ." Berndt concluded that he hoped "within the next couple of days" to comment on Logan's letter "point by point" and to advise him further "with respect to [Logan's] basic suggestions . . . relative to UAW recognition" at the Upland plant.

On March 9, 1965, Logan sent another letter to Berndt pointing out that the latter had not yet commented on his letter of January 28. Logan stated that he therefore "assumed" that none of Respondent's suggestions were acceptable to Berndt and Respondent was accordingly withdrawing them and "revert[ing]" to its "former position." Logan concluded with the statement, "We cordially invite your suggestions or comments as to where we go from here."

On March 10, 1965, Berndt telegraphed Logan, explaining

that he had not been in his office on a full time basis for the past few weeks, that he had prepared a detailed answer to Respondent's letter of January 28 prior to the receipt of Logan's March 9 letter, and expressing the hope that Logan would "review" his answer in the light of the date of its preparation.

Berndt in his letter, dated March 10, indicated acceptance of most of Respondent's proposals. However, Berndt expressed reservations or disagreement with regard to some of the proposals. Thus, Berndt stated that the proposed wage rates were unacceptable to the Union. Berndt also stated that Respondent's proposal "that the Company and the Union bargain on the individual availability of all employees presently on the seniority list for employment at Upland was acceptable" so long as "physical shortcomings" already in existence at the time of the closing of the Anderson plant and the "mental outlook and attitude" displayed by some employees since the beginning of the strike would not be used to prevent their employment at Upland. Berndt also pointed out that "it is the Union's prerogative to assign the Local Union number to any UAW bargaining agent" and Respondent "should not attempt to presume to tell the Union who [it] should send to the bargaining table." However, Berndt conceded it would be "somewhat shortsighted for the Union to assign an individual that would only result in stalemates rather than fruitful negotiations." Finally, Berndt suggested another meeting to settle their dispute.

Respondent did not reply to Berndt's March 10 letter, and the Union made no further request for a meeting during the next three months.

Communication between the parties was resumed on June 2, 1965, when Shetterly met Bradnick and Strutz at an unemployment compensation hearing in Anderson involving claims of the striking employees. During a recess, Shetterly suggested to Strutz that a meeting be arranged for the purpose of discussing (1) transfer rights and (2) pensions for employees who had reached retirement age during the strike. Strutz replied that he would be happy to meet with Shetterly any time the Federal Mediator arranged a meeting.

On June 15, 1965, Strutz and MacDonald met in the presence of a Federal Mediator with Shetterly and members of the Union's pension committee. After the parties discussed and settled the matter of pensions, the Mediator asked if there had been any further progress in negotiations between the Union and Respondent, and was informed that no meeting had taken place since the early part of the month. Shetterly declared that there were only about 75 employees in the picket line and that only about 50 percent of them would be interested in going to Upland. He then asked if the meeting could be continued to discuss transfer rights of Anderson employees. When Strutz inquired whether it was still Shetterly's position that any future meeting of the parties was contingent upon Strutz agreeing to discuss transfer rights, Shetterly replied that, although he would "not make it conditioned upon that", the topic of transfers was nevertheless what he wished to talk about. Strutz indicated he would arrange a meeting if Respondent decided to have one.

On June 30, 1965, Shetterly at another unemployment compensation hearing again asked for a meeting to discuss the transfer of Anderson employees to the Upland plant. Strutz replied that a meeting would be arranged through the Mediator if Respondent desired one.

The unemployment compensation hearing held on August 17, 1965, provided the next occasion at which Strutz and Shetterly met and again restated their positions regarding transfers and recognition of the Union for Upland. Strutz stated that he would get in touch with the Federal Mediator. Three days later, Shetterly wrote Strutz requesting a meeting concerning "the movement of the [Anderson] plant to Upland . . ." Shetterly wrote that "there are no conditions attached to my request for a meeting, merely that we bargain concerning the transfer rights of the Anderson employees, recognition of our Union at the Upland plant and the terms, working conditions and wages" at the Upland plant. Upon receiving no reply to this and another letter written to Strutz on August 30, Shetterly on September 15 addressed his request for a meeting on transfer rights to Boren.

Boren replied on September 17, taking the "position that

under the law and the contract that expired on October 31, 1964, the employees at Anderson who continued on strike against the plant, have no rights concerning re-employment at the Company's Upland plant." Boren offered to meet with the Union but insisted that Respondent was not obligated to bargain "concerning transfer rights which do not exist."

Shetterly's answer to Boren on September 28 suggested that a meeting be held during the week of October 11 or any other convenient date. This time Strutz replied on October 5, repeating Respondent's refusal to bargain concerning transfer rights and expressing a willingness to meet but not setting a date. Shetterly's letter of October 14 again requested a meeting to bargain about transfer rights. Strutz wrote on October 19, offering to meet and taking the position that "until such time as you may become the certified bargaining agent of our employees at Upland or at such time as we are convinced that you represent the majority of our employees at Upland, we can not consider your request for bargaining."

Toward the end of November 1965, Strutz met with Shetterly and Roy Cantrell, Assistant Regional Director of the UAW, in the Federal Mediator's office. Shetterly noted that there were still about 40 people drawing strike benefits and that these employees, if physically capable of working, as well as some others who were working for another employer, would probably wish to take jobs at Upland.[6] Shetterly proposed that (1) Anderson employees considered by the Company to be unable to perform their jobs should be given a physical examination at a competent medical clinic and approved or disapproved on the basis of comparison with normal persons of the same age; (2) other employees whose physical capacities were not in question should be given rights to jobs at Upland, bumping, when necessary, employees newly hired at Upland; (3) the International and Local 940 or some other UAW Local selected by Upland

[6] According to Strutz, Shetterly estimated that after eliminating certain employees who had reached retirement age, those who could not pass physical tests, and those who had obtained other employment, only 40 to 50 employees would be interested in transferring to Upland.

employees should be recognized as the bargaining representative of the employees at Upland and a contract negotiated to cover wages and working conditions at that plant. Strutz suggested in reply that the parties use an independent arbitrator to determine through "objective standards" which employees should be offered jobs at Upland. After the meeting, Shetterly telephoned Strutz to inform him that the Union could not agree to his proposal.

A final meeting, which was attended by Strutz, Shetterly, Berndt, and Emil Mazey, Secretary-Treasurer of the UAW, was held on February 4, 1966, in Detroit, Michigan. No progress was made as the parties professed to be waiting for an offer from each other.

It is clear from the foregoing that the parties, who had a long history of successful bargaining, dating back to 1941, concentrated on two basic issues at their meetings and in their correspondence from December 1964 to February 1966, namely, (1) transfer of Anderson employees and (2) recognition of the Union for the employees at the Upland plant. As noted above, these themes emerged at the meeting of December 16, 1964, when Respondent announced to the Union that it was contemplating moving from its "unsafe and unhealthful" plant in Anderson, Indiana, to a new location in Upland, Indiana.

That Respondent was willing from the outset to discuss the subject of the effects of the move on Anderson employees and their transfer to Upland is evident from its proposal at the first meeting when this topic became an issue. Thus, as indicated above, Respondent stated on December 16, 1964, that, if it made the move to Upland, it would consider for transfer each Anderson employee who applied at the new plant, with seniority preserved for those hired. When Respondent met with Union representative Shetterly on December 22 and 31, 1964, the parties again discussed the subject of transfer. Shetterly on both occasions requested from Respondent a "guarantee" to transfer all Anderson employees and Respondent explained why such a transfer would not be feasible and renewed its offer to consider Anderson applicants in the light of their qualifications for employment at Upland and to give severance pay to those not hired.

The transfer issue continued to be a key subject of bargaining at the four meetings held between January 9 and 22, 1965. The Union insisted on discussing the transfer of each employee on the seniority list, but Respondent refused to do so on the ground that it did not at that time know how much business it would have at Upland and also that it was "ridiculous" to discuss the transfer of those Anderson employees who did not care to go to Upland. However, Respondent again offered to consider Anderson applicants and promised seniority to those hired and separation pay for those not taken on at Upland.

The transfer issue was again fully explored by Respondent and the Union at the two bargaining sessions on January 26, 1964. It is significant that Union representative Berndt, who stressed recognition of "some local of the UAW" for the Upland plant as the paramount issue, took the position that "the economic make-up" of the Upland area and its distance from Anderson made it inadvisable to allow the transfer issue to "bog down" the negotiations. It is also noteworthy that Respondent's representative Logan agreed that it was relatively academic further to discuss the transfer issue in view of Berndt's statement that very few of the Anderson employees had a desire to go to Upland.

Despite Berndt's position that the transfer question was no longer a high priority issue, Respondent's continued attention to this subject was demonstrated by its letter of January 28, 1965, which, *inter alia,* set forth its willingness to bargain with the Union as to each individual on the Anderson seniority list for employment at Upland, taking into account their qualifications for the work, physical condition, mental outlook and attitude, absentee record, and job openings at Upland. Although Respondent, in the absence of a reply from the Union, reverted to its earlier position on transfers, the Union finally replied on March 10, 1965, when it declared Respondent's proposal generally acceptable but questioned some of the criteria set forth by Respondent.

The parties engaged in intensive and hard bargaining at a series of meetings and through an exchange of correspondence for a 3-month period extending into March 1965.

It is plain that during that time they fully dealt with the transfer issue. Although Shetterly on two occasions in June 1965 requested that bargaining resume on transfer rights, Respondent took no steps to arrange a meeting for that purpose. However, when the parties did meet in mid-August of 1965, they merely restated their well defined positions developed at the many earlier meetings. While Respondent on September 17, 1965, wrote the Union that it had no obligation to bargain concerning transfer rights, Respondent did in fact thereafter discuss transfer rights and proposed that an arbitrator determine through the use of objective standards which employees should be offered jobs at Upland.

We conclude on the basis of Respondent's conduct during frequent meetings and correspondence with the Union that Respondent met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees and their transfer to the new plant. Although many of these meetings and the exchange of a number of letters took place in the months prior to February 25, 1965, the first day of the Section 10(b) period, the positions taken during that time continued and were restated by Respondent and the Union subsequent to February 25, 1965. While the parties did not reach complete agreement on the transfer issue, the record shows that Respondent over a period of many months considered the Union's position, explained its own position, and nade counter proposals as well as some concessions.[7] Although bargaining by both parties dwindled considerably after March 1965, we regard that as an indication that bargaining was approaching an impasse when both parties became or less frozen in their positions regarding transfers. Accordingly, in the circumstances of this case, we find, contrary to the Trial Examiner, that the General Counsel has not proved by a preponderance of the evidence that Respondent failed to bargain with respect to the effect on Anderson employees of the move to Upland.

As noted above, the second basic issue frequently discussed by the parties was recognition of the Union for the Upland plant. The Trial Examiner found that the removal

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[7] *The Proctor & Gamble Manufacturing Company*, 160 NLRB No. 36.

of the plant from Anderson to Upland, a distance of 32 miles, had no greater significance than a removal across the street and that the move therefore effected no substantial change in the status or obligation of Respondent toward its employees or the Union which was their bargaining representative. Accordingly, as already stated, the Trial Examiner held that Respondent was under an obligation to bargain with the Union concerning the terms and conditions of employment at the Upland plant. Respondent does not dispute the Trial Examiner's finding that it refused to recognize the Union as the representative of the Upland employees. It contends, however, that the Trial Examiner erred in finding such conduct unlawful by not taking into account this test for determining whether Respondent was under a duty to recognize the Union for the new plant. Would at least a majority of the Anderson employees have transferred to the new plant but for Respondent's failure to negotiate concerning the effects of the move?[8]

We find merit in Respondent's argument. As we have found insufficient warrant for concluding that Respondent did not meet its obligation to bargain over the effects of the move, there can be no basis for attributing the failure of Anderson employees to transfer to Upland to any unfair labor practice on the part of Respondent. Moreover, it is clear from the record that at no time during the bargaining over the effects of the move did a majority of the production and maintenance employees represented by the Union at Anderson have an interest in transferring to Upland. Accordingly, we find, contrary to the Trial Examiner, that Respondent was under no obligation to bargain with the Union concerning terms and conditions of employment at the Upland plant.

As noted above, the Trial Examiner also found that the economic strike, which commenced on November 6, 1964, was converted into an unfair labor practice strike by Respondent's refusal to bargain. As we have found that Respondent engaged in no conduct that violated Section 8(a)(5) of the Act, we conclude, contrary to the Trial Exam-

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[8] *Cooper Thermometer Company*, 160 NLRB No. 15.

iner, that such conversion did not take place at any time.

In view of our conclusion that Respondent has not committed any of the unfair labor practices alleged by the General Counsel, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., April 24, 1967.

FRANK W. McCULLOCH,
Chairman.

JOHN H. FANNING,
Member.

HOWARD JENKINS, JR.,
Member.

National Labor Relations Board.

(SEAL)

The Decision of the Court of Appeals for the District of Columbia Circuit

March 6, 1968

Prettyman, Senior Circuit Judge:—Petitioner is a Union which for more than twenty years prior to the present proceeding had been the bargaining representative of the production and maintenance employees of Pierce Governor Company, Inc., a small manufacturing company operating in Anderson, Indiana. The Union filed an unfair labor practice charge[1] against the Company. The Board, reversing the trial examiner, dismissed, and the Union petitions for review.

Pierce Governor Company, Inc., respondent-intervenor, informed the Union at a contract renewal negotiation meeting in December, 1964, that it was considering a plant relocation because it would be "economically advantageous." The Company's plant at Anderson was sixty-five years old and ramshackle. It was open to complaint on account of health and safety conditions, including obnoxious odors, a heating problem, leaking roof, defective wiring and plumbing. The trial examiner in the present proceeding found "[i]ts dilapidated condition * * * notorious."[2] Because of this state of the building the Union sought to obtain a contract provision allowing it to strike over health and safety conditions. After further deliberation the Company announced that its intention to remove had become firm, and it proceeded to design and build a new plant some thirty-five miles away at Upland, Indiana,

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[1] Sec. 8(a), Labor Management Relations Act, 1947, 61 Stat. 140, 29 U.S.C. § 158(a):

"Sec. 8(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[2] It was stipulated that as of September 1, 1964, the physical condition of the plant at Anderson had deteriorated to a point where its continued operation without proper repair and remodeling created unsafe and unhealthful working conditions.

saying that community had made the "most attractive offer". That the move was precipitated by legitimate economic reasons [3] and was in no way anti-union is not disputed. This is an important basic factor in the dispute now before us.[4]

At the time of this announcement the Company and the Union were already negotiating for a renewal of their existing bargaining agreement,[5] and in the following thirteen months, between December, 1964, and February, 1966, negotiations ran the gamut of ordinary labor relations. It is helpful to keep in mind that these parties were not newly acquainted but were long-time adversaries at the bargaining table. The topics discussed at these sessions included several directly related to the relocation of the plant, including, but not limited to, and interim contract for the Anderson plant, unemployment compensation, and pension payments. The relocation and its consequences were the direct subject of many conversations which erupted from time to time at these meetings. Gradually the positions of the parties became irreconcilable. The Union insisted that the Company "guarantee" the transfer of all employees from Anderson to Upland and that it (the Union) be recognized as the exclusive bargaining agent at the new site. The Company's position was that it would give consideration to any Anderson employee who applied at Upland, with retention of seniority for all those hired, but would not "guarantee" transfer, because some of the employees at Anderson were physically unable to perform a full day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike which the Union had

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[3] Local 57, International Ladies' Garment Workers' Union v. NLRB, 126 U.S. App. D.C. ——, 374 F. 2d 295, 64 LRRM 2159 (D.C. Cir.), cert. denied, 387 U.S. 942, 65 LRRM 2441 (1967).

[4] NLRB v. Rapid Bindery, Inc., 293 F. 2d 170, 48 LRRM 2658 (2d Cir. 1961). See NLRB v. Great Dane Trailers, 388 U.S. 26, 65 LRRM 2465 (1967).

[5] The parties began bargaining in September, 1964, for a new agreement to replace the one which terminated on October 30, 1964.

initiated in November, 1964, when negotiations on the original Anderson contract had broken down. The Company said it would not recognize the bargaining representatives from the old plant until such time as that Union became the certified bargaining representative at the new plant or could convince the Company that it represented a majority of employees there. The ensuing impasse went to the Board.

The Board held, inter alia,[6] that the Company had met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees. We think this finding was supported by substantial evidence. Throughout the period of negotiations there were many meetings and much correspondence. A Union official identified twelve meetings by date in 1964. They continued into 1965. Officials, ranging from the Company's attorney to its president, were involved, as were local, regional and international representatives of the Union, often in the presence of a federal mediator. Witnesses in the present proceeding identified many subjects discussed. The record is replete with proposals, counter-proposals and concessions by the Company. At a stenographically reported meeting in the presence of a federal mediator, the Company attorney offered to bargain about the relative advantages or disadvantages of the move itself. The Company, having set out its rationale for refusing to "guarantee" the transfer of all employees from Anderson to Upland, proposed that those whose physical capabilities were in question be examined by an independent arbitrator, and that subject was discussed. The Company assured the Union that no jobs had been promised at Upland and that all applications would be given equal consideration, including such factors as age, health, qualifications, and prior employment records. It offered severance benefits in the nature of separation pay to those who did not choose

[6] The Board also found that the economic strike which began in November, 1964, was never converted into an unfair labor practice strike, because the Company engaged in no conduct violative of the Act.

to go, could not go, or were not selected. It offered to close the Anderson plant to enable the employees there to obtain unemployment Service to endeavor to arrange for relocation of employees seeking jobs in the Anderson area; other discussions covered seniority and pension payments.

The Company had a well-defined position on transfers, which it stated, explained and discussed at great length. This position did not change throughout the bargaining, but such a course is not unlawful.[7] The Act does not require yielding of a position fairly maintained, and there is an explicit provision to that effect in the statute.[8] So it seems to us the Board was correct in concluding that the Company did bargain concerning the effects of the relocation on Anderson employees.

The other principal point presented upon this petition, according to the prehearing conference stipulation, is whether the Board properly found that the Company was under no obligation to bargain with "the Union" as to the terms and conditions of employment at the new Upland plant. This question turns upon what may be properly considered "the Union" for purposes of bargaining. The

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[7] NLRB v. Insurance Agents' International Union, 361 U.S. 477, 45 LRRM 2705 (1960); NLRB v. American Ins. Co., 343 U.S. 395 (1952); NLRB v. Southwestern Porcelain Steel Corp., 317 F. 2d 527, 53 LRRM 2307 (10th Cir. 1963); NLRB v. Mayer, 196 F. 2d 286, 30 LRRM 2077 (5th Cir. 1952); Aluminum Ore Co. v. NLRB, 131 F. 2d 485, 11 LRRM 693 (7th Cir, 1942).

[8] Sec. 8(d), Labor Management Relations Act, 1947, 61 Stat. 142, 29 U.S.C. § 158(d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession:* • • •." (Emphasis supplied.)

problem frequently arises and is generally clouded.[9] The smog evolves from uncertainty as to the nature and function of each of the various units involved—international unions, locals, bargaining units, bargaining committees, local-regional-international representatives, and the relationship among them. In the case now at bar all these entities appear. Petitioner identifies itself both in its petition for review and in the charges it filed in its complaint as the International Union, United Automobile, Aerospace, and Implement Workers of America (UAW). It states its position to be, however, that the Company violated Section 8(a) (1) and (5) of the Act "By refusing to bargain with the Anderson local (while willing, for a time, to bargain with a different UAW local at the new location) * * *."

The Local was not the certified bargaining representative of these employees. The trial examiner found as a fact that the International was certified as the "exclusive bargaining agency" for them. He continued that since 1941 contracts had been made between the Company "and the International and its Local 940, jointly (herein called 'the Union'), as the 'exclusive bargaining agency' for the employees * * *." The Board made similar findings. Thus it clearly appears that the International was the certified bargaining representative but that the International and the Local "as an integral part" of the joint bargaining agent negotiated and signed the contracts. How the Local became engrafted into the process is not shown on the record. At any rate it was never the certified bargaining agent nor an independent bargaining entity; at most it was a *de facto* agent.

The Company at no time refused to bargain with the certified bargaining representative, the International. Quite the contrary is the fact. On January 28, 1965, the Company wrote to the Director of the Regional Office of the UAW a long letter outlining "the principles generally acceptable to us." The first of these was "Recognition

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[9] See Rose, Relationship of the Local Union to the International Organization, 38 Va.L.Rev. 843 (1952), and Note, Labor Law Problems in Plant Relocation, 77 Harv.L.Rev. 1100 (1964).

of a UAW-CIO Local at Upland." And the second was "Consummation of a 5-year contract." The letter referred to prior conversations. It was prefaced with the statement "That we are not obligated to recognize Local 940" for any purpose other than at Anderson, but stated its willingness to "arrive at some agreement with you" about Upland, After considerable delay the Regional Director wrote the Company, raplying to each point in the Company's letter. He said in part: "POINT 1. Your offer to recognize UAW-AFL-CIO as the bargaining agent for the Pierce Governor employees at the Upland plant is, of course, acceptable." He expressed preference for a three-year contract. Thus it is quite clear that the Company did not fail or refuse to recognize the International Union.

We also think the Board was correct if the situation is viewed from the standpoint of the Local. In the first place, where the International has been certified, an employer could hardly be held guilty of an unfair labor practice for failing to recognize a local union which was not certified. And we think this rule must apply even if the Local acts as an integral part of the single joint representative of the employees at the bargaining table. An uncertified organization cannot, it seems to us, inject itself, or be injected by a friendly parent, into a labor relationship where there is a certification, in the face of the statutory provisions as to exclusiveness, certification, etc.[10] This is not to say that such an organization, if it enjoys employee approval, may not enjoy a preferred status in understanding the problems peculiar to a particular locality and enter into negotiations, sit at the bargaining table, or make proposals regarding these problems. But beyond this, Local 940, whatever its status at Anderson, was shown not to be the representative of the employees

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[10] Sec. 9(a), Labor Management Relations Act, 61 Stat. 143 (1947), 29 U.S.C. § 159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: • • •"

at Upland. The Union, when challenged by the Company, failed to establish, or even to claim, that it represented a majority of the employees at Upland.

It is certainly clear that the Upland employees had a right to bargain about their own working conditions and therefore to name their own bargaining agent. This right is basic in our labor law.[11] It is also clear that the Company was prohibited from impinging upon that choice.[12] It is prohibited from bargaining with anybody except a representative selected by a majority of employees.[13]

The record in this case shows that the Union representative assured the Company representative at a meeting "that it was not essential that Local 940, as an entity, continue to be, at Upland, the 'local' part of the joint representative of the employees there but that, after an agreement had been reached with the International covering the Upland plant, a new local could be established and an election scheduled at which the Upland employees could select their own bargaining committee."

It is established that, although a plant relocation does not in itself invalidate a union's representative status,[14]

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[11] Sec. 7, Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 157:

"Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities • • •."

[12] Sec. 8(a)(1), (2), (3), Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1), (2), (3):

"Sec. 8(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: • • •;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •."

[13] Supra note 10.

[14] California Footwear Company, 114 N.L.R.B. 765, 767-69, 37 LRRM 1037 (1955), enforced in part sub nom. NLRB v. Lewis, 246 F. 2d 886, 40 LRRM 2371 (9th Cir. 1957). A similar analysis applies where there is a change in ownership of an employing enterprise; where the seller's enter-

such a relocation, or any other substantial change in the enterprise which is accompanied by a change in employee personnel sufficient to justify a reasonable doubt concerning the continued majority, is a valid premise for a company's demand for assurance on the point,[15] provided anti-union policy or intent does not taint the company's position.[16]

In the case at bar the Company gave its Anderson employees ample notice[17] of the move and of the right to apply for employment at the new site. The fact of the move was emphatically asserted to the bargaining committee at negotiation meetings. It was testified that at one such meeting two of the three bargaining committee members said that under no circumstances, regardless of what rate of pay was offered "or anything", would they be wanting to transfer to Upland. At one point the Union representative indicated that, after eliminating certain employees who had reached retirement age, those who could not pass physical qualifications, and those who had obtained other employment and wanted to remain at their new jobs, only about forty Anderson employees (there were some two hundred at the new plant) would be interested in transferring. At one time the lawyer representing the Company and the Regional Director for the UAW agreed that the Upland area was of an "economic make-up" different from that at Anderson and that to "let this thing bog down in terms of transfer rights if there were any was a mistake."

We think the business of changing jobs is of no small consequence and may indeed involve a number of perplexing problems. Moving one's job for even so short a distance as forty miles may involve not only such direct factors as long drives and different times for arising in the morning and reaching home in the evening each day, but also collateral matters such as comparative labor cus-

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prise itself remains otherwise substantially unchanged, the seller's duty to bargain devolves upon the purchaser. NLRB v. Downtown Bakery Corp., 330 F. 2d 921, 56 LRRM 2097 (6th Cir. 1964).

[15] Brooks v. NLRB, 348 U.S. 96, 35 LRRM 2158 (1954).

[16] Supra note 3.

[17] Supra note 4, at 176.

toms and people, problems of schools, both as to the impact of change and as to comparable quality, social affiliations, interests and habits. These and many other factors which are small in a textbook thesis loom large and real in the lives of ordinary people, especially those who live and work in small towns.

The first few production employees at Upland were hired during February of 1965. By August 1st the employee complement was 212, and thereafter there were at least 190 employees on the payroll. Only one person worked at both Anderson and Upland. The Company wrote the Union on October 5th that "No Anderson employee has presented himself at Upland for employment at the Upland plant." The Union made no effort to count its membership at the Upland plant, and in this proceeding it made no claim that it did represent a majority of those employees. The fact is that employees formerly at Anderson who were members of Local 940 did not constitute a majority of employees at Upland.

In sum, then, on this part of our problem the Company had reasonable grounds to believe that a majority of the people who applied and were hired at Upland did not belong to Local 940. When the Company reflected its concern and posed the question by offering to recognize any union which could show membership of a majority of its employees, the burden would seem to shift to the Union to make such a showing. Certainly the burden does not rest with the Company to show a lack of majority. If the question had been membership in the International, perhaps a different question would be presented. But in the situation here depicted it would seem correct to say, as the Board did, that the Union had failed to sustain its charge that the Company committed an unfair labor practice by failing to recognize Local 940 as the bargaining agent of its Upland employees.

The Union says, and the trial examiner held, that it need not sustain the burden of showing a majority at the new plant, that since the relocation of the plant was so

short a distance from the old site, and since the management and the business remained the same, there is a presumption that a majority of the employees remained the same. The Union relies upon Cooper Thermometer Company v. NLRB,[18] a decision of the Second Circuit. But we do not find in that case what the Union and the examiner found there. The Company there did not bargain concerning the transfer. The court held that under those circumstances a presumption of continuation arose. In the case at bar there was bargaining, and so no premise exists for this presumption. Moreover we cannot presume to be a fact something shown by recorded evidence not to be the fact.

We are of opinion that the Board was not in error in its determination of the problems presented here, and its disposition of the matter is therefore

Affirmed

BAZELON, Chief Judge, dissenting:—I read the majority opinion to say that the Upland plant was not a continuation of the old Anderson facility. I disagree. But if my brethren are correct it is wholly unnecessary to reach the question of representation at the new plant.

We would need to decide whether Local 940 and the International should continue to represent the old employees and replacements at the new plant only if, as the Examiner found, this was a continuation situation. Without such continuation or employee consent, Local 940 and the International do not represent the workers at Upland and the question of the identity of the bargaining representative there does not arise.

Accordingly, anything the majority says about representation at Upland has no bearing on the union's Section 8(a)(5) complaint which was based on the assumption that the Anderson unit continued. In any event the distinction drawn by the majority between Local 940 and the International for purposes of representation is untenable. Em-

[18] 376 F. 2d 684, 65 LRRM 2113 (1967).

ployees have the right to bargain through representatives of their own choosing.[1] And the Act does not prohibit the employees from adding an additional bargaining agent provided the certified representative is not excluded.[2] The fact that only the International was "the certified bargaining agent" does not exclude the Local which had jointly represented the employees for 26 years, nor does it abrogate the company's agreement in its last contract, signed by the International and the Local, recognizing "Local Union 940 . . . and the International Union . . . as the exclusive bargaining agency for all the company's employees."

The Court is correct in not relying on Cooper Thermometer v. NLRB[3] to control the continuation issue, since the company here was always willing to bargain about the impact of the plant relocation as it was not in Cooper. However, I cannot agree with my brethren that the move from Anderson to Upland was the type of substantial change in the enterprise "which is accompanied by a change in employee personnel sufficient to justify a reasonable doubt concerning the continued majority . . ." Considering that (1) the Examiner found that "the removal of the plant from Anderson to Upland had no greater significance . . . than would have had its removal across the street," (2) 85% of the old supervisory and clerical personnel were able to work at the new plant even though they undoubtedly faced many of the problems which the majority identifies as arising from plant moves, and (3) because there has been no suggestion that the employees here were not the principal family wage earners, I question whether absent a violation by the employer of Section 8(a)(5) there would have been any issue of the unions' continued status at the new Upland plant.

I would remand to the Board to reconsider the continuation issue in light of the foregoing.

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[1] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 1 LRRM 703 (1936).

[2] N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342, 350, 42 LRRM 2034 (1958).

[3] 376 F. 2d 684, 65 LRRM 2113 (1967).

CONFLICTING DECISION OF COURT OF APPEALS FOR THE SECOND CIRCUIT IN COOPER THERMOMETER CO. v. NLRB, 376 F. 2d 684 (1967).

Before FRIENDLY, ANDERSON, and FEINBERG, Circuit Judges.

Full Text of Opinion

FRIENDLY, Circut Judge:—Cooper Thermometer Company, a firm of modest size engaged in the manufacture of commercial-industrial thermometers, seeks review and the National Labor Relations Board asks enforcement of an order, 160 NLRB No. 150, 63 LRRM 1219, finding that Cooper had violated § 8(a)(5) and, in consequence, § 8(a)(1) of the National Labor Relations Act by refusing to bargain with United Electrical, Radio and Machine Workers of America, Local 233 (hereafter "the Union") concerning the termination of its operations at Pequabuck, Conn., and their relocation in Middlefield, Conn., 27 miles away. The petitions raise important issues, unhappily little illuminated by the Board,[1] concerning the scope of an employer's duties and the appropriate remedies for their violation in cases of plant relocation for economic reasons. We hold the Board was warranted in finding that Cooper violated § 8(a)(5) by refusing to supply information pertinent to, and to bargain over, the transfer of employees to the new plant. However, we do not enforce those parts of the Board's order which are based on the unsupportable assumption that if Cooper had bargained, it would have granted not only preferential hiring but transfer of full seniority and other contractual benefits as well.

Cooper had long recognized the Union as the exclusive bargaining representative for its production and maintenance employees, some 80 in number at the time here relevant. The last agreement, executed in 1962 and modified in May, 1964, was scheduled to expire May 17, 1965. On September 11, 1964, Cooper called a meeting with the

[1] A three-member panel merely endorsed the decision of the Trial Examiner. As will appear below, the lack of adequate discussion is not explicable on the basis that the decision was following well-trodden paths.

Union at which it announced its intention to move from Pequabuck to the Middlefield region for economic reasons, primarily the inadequacy of its existing facilities and the cost of correcting them; it expected to break ground by the end of the month and hoped the new building would be ready by spring or early summer. It said that it had not yet determined its final hiring plan but that it would welcome applications for the new plant from present employees, whom it would consider equally with all other applicants, and that it would attempt to relocate nontransferring employees to other jobs in the Pequabuck area. Notice of the proposed relocation was posted on plant bulletin boards.

Early in January the Union sent Cooper two letters, one of which requested certain information relating to operations at the new plant[2] "for the purpose of entering into negotiations on the terms and procedures for an orderly and equitable transition." Cooper's answer professed inability to understand this language, although the company agreed to meet with the Union at an early date "to discuss with you all appropriate matters as may involve the orderly cessation of our manufacturing operations at the Pequabuck plant" and said it might then be "in a better position than we are at the present time to make available to you appropriate information necessary to obtain this objective." In February the Union repeated its request, saying that Cooper had defined the subjects of negotiation too narrowly.

At a meeting on March 1, the Union stated its position that not only the closing of the old but the opening of the new plant were matters for collective bargaining; specifically it wanted to know whether Cooper would bargain as to having present employees go to Middlefield plant "with the same conditions, seniority and others" and asked to be recognized as the collective bargaining agent at Middlefield. Cooper countered by furnishing and offering to furnish information the Union had requested in January con-

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[2] This included a list of all job classifications and occupations, the number of employees in each, the rate schedules, and the schedule of hours and any other conditions of employment that would vary from those in the Pequabuck contract.

cerning the economic need for the move, but persisted in its refusal to supply job information as to the new plant, which it claimed to be "confidential," except to the extent of saying that rates would average 40¢ an hour less and there would be no piecework but a day rate with "normal fringes equal to the area."[3] It said it would supply applications to Pequabuck employees but that neither employment nor seniority and other benefits would "transfer automatically" and denied the Union's request for recognition at Middlefield. On the other hand it was willing to discuss vacation or severance benefits to Pequabuck employees who did not transfer. The following day Cooper posted a notice that operations at Pequabuck would cease on May 17, that applications for employment at Middlefield would be available before April 22 with interviews to follow, and that employees desiring help in obtaining other employment should contact their foreman.

By an exchange of letters in March the Union requested negotiations to amend the collective bargaining agreement and Cooper gave the notice of intention to terminate the contract necessary to avoid automatic renewal and asked for a conference. At a meeting on March 22 Cooper made proposals as to vacation pay and insurance; when the Union demanded that Pequabuck employees "be taken" to Middlefield with existing rights and benefits, Cooper refused to do more than offer opportunity for employment on an individual basis. When further meetings on March 29 and April 6 took much the same course, with the Union demanding and the company refusing to transfer employees to Middlefield or to grant any other benefits "that cost money," the Union on April 15 filed an unfair labor practice charge.

At Cooper's instigation, both parties met on May 6 with a state mediator but neither changed its position. The following day the Union requested the names of the Pequabuck employees who had sought and had been accepted for work at Middlefield. Cooper answered that 42 had requested applications, that 29 had filed them, that interviews had been arranged for 21 (with the additional eight interviews still

[3] Average hourly pay at Pequabuck had ranged from $1.45 to $2.97.

to be arranged), that only 14 had appeared at their interinterviews, and that of those 14 only four said they wished to work for Cooper in Middlefield. Cooper's letter also set forth criteria the company was using in hiring workers for the new plant, and concluded by stating the company's willingness "to discuss these matters further with you at our next Bargaining Conference." The Union rejoined on May 15, with 52 form letters, each signed by an employee, requesting "a transfer to the new location of the company at Middlefield, Connecticut with full recognition of my seniority, which I acquired in your service at Pequabuck through the many collective bargaining agreements" between Cooper and the Union. Cooper returned these to the Union, writing that it had "met with the Union on numerous occasions and negotiated on Union demands that included the right of transfer, referred to in your letter, and on which we failed to reach agreement."[4] A final meeting with the mediators on June 2 produced only a reiteration of attitudes previously expressed.

Public transportation between Pequabuck and the Middlefield plant is virtually unavailable. The approximate travel time by private car is 45 minutes. Nearly 80% of the Pequabuck employees were women, many of them "married or second employees in the family." In early August Cooper wrote 83 letters to former workers saying that it needed their experience at Middlefield and that most Pequabuck employees then working there were receiving hourly rates equal to or higher than those formerly paid and inviting them to telephone collect. Fourteen who called were not sufficiently interested to come for an interview; of the eleven who did only two were hired but left after a few days because, on the testimony of a company witness, "it was too far to travel." On the other hand, one employee, a former union vice-president, who came for an interview— the only employee called by the General Counsel as a witness—testified that he was offered $1.58 per hour to do the work for

[4] It was stipulated that only 24 of the 52 signers filed an application for employment other than this form letter, and that 21 of these were interviewed of whom 20 indicated lack of interest and the remaining one was hired.

which he had been paid $2.76 at Pequabuck. The company also offered him a job requiring more skill than the one he had previously had, which would have paid as much as $2.12 an hour, but he also refused this because he "couldn't afford to travel that distance for that money." Ten of the organized employees and virtually all the supervisors did transfer.[5]

The Trial Examiner concluded that by failing to furnish the Union with job data relating to the Middlefield plant, refusing to negotiate concerning conditions of transfer, and insisting on dealing with employees on an individual basis, Cooper had violated § 8(a)(5). Because of the geographical proximity of the two plants, "of all the evidence as to employees' desires respecting transfer," and of "the absence of convincing evidence" that a majority of the Pequabuck employees would not have transferred if Cooper "had fulfilled its obligation under the Act," he thought it was "not unreasonable to infer" that those workers would have transferred had Cooper bargained fully and that consequently the company had further violated § 8(a)(5) by refusing to recognize the Union as bargaining representative at Middlefield. He recommended that Cooper be required to do what it had unlawfully refused and "offer immediate reinstatement and make whole those unit employees at the Pequabuck plant who were discharged as a result of Respondent's unlawful actions." A footnote stated that "reinstatement shall be to the employee's former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges" and that "backpay shall be computed at the rates provided in the Pequabuck plant contract." The Board accepted these recommendations without discussion.

We have no difficulty in approving the Trial Examiner's first conclusion. Though we assume that, as Cooper maintains, the existing contract, which in any event it could and did terminate by May 17, 1965, did not apply to the new plant, Oddie v. Ross Gear and Tool Co., 305 F.2d 143, 50 LRRM 2763 (6 Cir.), cert. denied, 371 U.S. 941, 51 LRRM

[5] Included in the ten are the two who were hired in August but left within three days because of the difficulty of commuting to the new plant.

2717 (1962); Zdanok v. Glidden Co., 327 F.2d 944, 952, 55 LRRM 2249 (2 Cir.), cert denied, 377 U.S. 934, 56 LRRM 2224 (1964); cf. Zdanok v. Glidden Co., 288 F.2d 99, 47 LRRM 2865 (2 Cir.), cert. granted on another issue, 368 U.S. 814, 48 LRRM 3111 (1961), aff'd, 370 U.S. 530, 50 LRRM 2693 (1962), the Board may reasonably interpret § 8(a)(5), as explicated in § 8(d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union and to negotiate the terms of the shutdown, as we held in NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 48 LRRM 2658 (1961), but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests. The most important interest of workers is in working; the Board may reasonably consider that an employer does not fulfill his obligations under § 8(a)(5) if he refuses even to discuss with employees' representatives on what basis they may continue to be employed. This is not novel doctrine. See Brown-McLaren Mfg. Co., 34 NLRB 984, 9 LRRM 50 (1941); Brown Truck & Trailer Mfg. Co., 106 NLRB 999, 32 LRRM 1580 (1953); Bickford Shoes, Inc., 109 NLRB 1346, 34 LRRM 1570 (1954). While Cooper was not bound to agree to the Union's demand that the Pequabuck employees "be taken" to Middlefield with everything unchanged or even to less burdensome proposals, the Board could properly fault it for an attitude which, in effect, ousted the Union from any role in negotiating what might be offered to employees desiring to transfer. As was said in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 214, 57 LRRM 2609 (1964), "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

The finding of a further § 8(a)(5) violation in Cooper's refusal to recognize the Union as bargaining agent at the new plant raises a much more difficult issue. The difficulty stems from the hypothetical nature of the question on which decision turns—would a majority of the Middlefield em-

ployees have wished to be represented by the Union if Cooper had not committed the initial violation? While the sole fact firmly known is that only ten Pequabuck employees transferred, the Board might well have been warranted in finding that a majority could have brought the Pequabuck contract with them—even though we do not take the problem of traveling 54 miles every day by private car so lightly as the Trial Examiner did.[6] On the other hand we doubt that we would sustain such a finding based, as the Examiner's apparently was, on the assumption that Cooper would have agreed to the full recognition of seniority stated in the May 7 letters of the 52 employees[7] but only to that, even if there were reason to suppose that bargaining might have led to such an agreement on Cooper's part. The letters were *post litem motam*, the signers had little to lose by offering to transfer on a condition they knew would not be met, and the geographical facts and the history of the applicants, interviewees and transferees raise grave question how seriously these letters can be taken.[8] However, we do not need to decide that since § 8(a)(5) did not

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[6] There was no evidence whether the residences of the Pequabuck workers were so located as to make car pools or other cost-sharing devices practicable or as to other employment opportunities in the Pequabuck area which might have rendered the time and cost of the 54-mile daily drive unattractive even at the old rates.

[7] The Examiner's finding seems to have been based on the supposition that if Cooper had bargained, it would have agreed at least to hire the Pequabuck employees preferentially with full seniority, since he found it "apparent" that "there was little desire on the part of the employees" to transfer on any terms less than those "outlined in their application which was prepared by the Union."

[8] In addition to the evidence already cited strongly suggesting that the Pequabuck employees found it unprofitable to travel to Middlefield for the lower wages paid there, Tomasetti, the Union's international representative and chief negotiator who was called as a witness by the General Counsel, testified that at the rates of pay offered by Cooper at the Middlefield plant, Pequabuck employees "would have to be crazy to go there." Audette, an officer and negotiator for Cooper, named several of the 52 signers of the Union's letter who did not appear for interviews because they did not want to travel to Middlefield. One of these, Belisle, was enthusiastically sought by the company but refused to transfer even when offered 50¢ per hour more than he had been earning. And of the ten Pequabuck employees who did transfer, at least three quit within a short time because of the burden of commuting.

require Cooper to recognize the seniority of the Pequabuck employees; its duty was only to talk in good faith, and the evidence makes it fairly plain that such talk would not have that result.

Doubtless because of the difficulty in determining how many employees would have transferred, the Board has been rather cautious before ordering an employer to recognize a union designated at the old plant as the bargaining agent at the new. Until very recently this has been done only when the distance was so short that there was considered to be no change in the bargaining unit, see Royal Oak Tool & Machine Co., 132 NLRB 1361, 48 LRRM 1512 (1961), enforced 320 F.2d 77, LRRM 2699 (6 Cir. 1963); Royal Optical Mfg. Co., 135 NLRB 64, 49 LRRM 1432 (1962); Hurley Co., 136 NLRB 551, 49 NLRB 1810 (1962), enforced 310 F.2d 158, 51 LRRM 2627 (8 Cir. 1962), or there was proof that the majority at the new plant were union workers from the old, see Die Supply Corp., 160 NLRB No. 99, 63 LRRM 1154 (1966).[9] Until 1965 the only case arguably constituting an exception, save for Rapid Bindery, 127 NLRB 212, 45 LRRM 1524 (1960), was one where the employer had moved for the very purpose of avoiding a continuation of collective bargaining, the union was not even told of the move until it had happened, and the two plants were only 12 miles apart within the Los Angeles Metropolitan Area. California Footwear Co., 114 NLRB 765, 37 LRRM 1037 (1955), enforced sub nom. NLRB v. Lewis, 246 F.2d 886, 40 LRRM 2371 (9 Cir. 1957). In its opinion in that case the Board distinguished Brown Truck & Trailer Mfg. Co., 106 NLRB 999, 32 LRRB 1580 (1953), where it had refused to order recognition by an employer who had likewise failed even to notify its union of the move, on the grounds that in Brown there was no

[9] The Board itself has recognized this to have been its historic policy: "[I]n cases where an employer relocates a plant at a distant site in order to avoid statutory bargaining obligations, the Board has not imposed an obligation to bargain at the new location until the statutory representative could reestablish its representative status at the new location." Garwin Corp., 153 NLRB 664, 666, 59 LRRM 1405 (1965), enforced in part sub nom. Local 57, ILGWU v. NLRB, — F. 2d —, 64 LRRM 2159 (D.C. Cir. 1967). See also 30 NLRB Ann. Rep. 29, 115-17 (1965).

proof of evil motive and that problems of transportation to a town 30 miles away "raised serious doubts that a majority of employees would have transferred to the new plant even if the Respondent there had bargained in regard to transfers." 114 NLRB at 768-69, 37 LRRM 1037. The Board had similarly refused to issue an order for recognition at the new plant in Brown-McLaren Mfg. Co., 34 NLRB 984, 9 LRRM 50 (1941), where the move was some 40-50 miles and in Bickford Shoes, Inc., 109 NLRB 1346, 34 LRRM 1570 (1954), where it was but 28. When in Rapid Bindery the Board did order recognition of the union as bargaining agent at the new plant, there some 50 miles away, we declined to enforce this, noting, 293 F.2d at 177, 48 LRRM 2658, that the union did not appear to represent any of the employees at the new plant and that if a substantial number of the employees there should designate the union, it could petition for an election. Later the Board ordered recognition of the old union at a new plant in Miami to which the employer had moved from New York City, Garwin Corp., 153 NLRB 664, 59 LRRM 1405 (1965), but the move itself was found to violate §8(a)(3) and the decision can be read as limited to such "runaway" cases. The Court of Appeals for the District of Columbia by a divided vote, nevertheless denied enforcement of this portion of the order, Local 57, ILGWU v. NLRB. —— F.2d ——, 64 LRRM 2159 (1967), even though it accepted the Board's finding that the company had moved in order to eliminate the union—a suggestion not even made by the General Counsel in this case—and the order unlike that here, contained a limit on the contract bar rule to one year unless the union established a majority at the new plant.

The Board urges that here the new plant was somewhat nearer than in Rapid Bindery where we denied enforcement of a recognition order, and that it was much nearer than in Garwin; however, Cooper's conduct was nothing like so gross a violation of the Act as was Garwin's against which a § 8(a)(3) finding was sustained. Exercising our reviewing authority in the manner we have been instructed, Universal Camera Corp v. NLRB, 340 U.S. 474, 487-88, 27 LRRM 2373 (1951), we cannot conclude that this record fairly supported a finding that majority of the Pequabuck

employees, 80% of them women, would have transferred to Middlefield on any basis to which collective bargaining could reasonably have been anticipated to lead. Although the Board may expand its remedies in the light of experience, it can hardly expect a court to look favorably on an order which without explanation imposes a sanction on this employer that was denied in the two cases most closely comparable, Brown Truck & Trailer Mfg. Co., supra, and Bickford Shoes, Inc., supra, when the circumstances relied on for the new departure in Garwin Corp., a ruling which did not commend itself to a majority of the Court of Appeals for the District of Columbia—the closing of the old plant in violation of § 8(a)(3) and a runaway to a point so distant that a reinstatement order would necessarily be almost totally ineffective, see 153 NLRB at 665-66, 59 LRRM 1405—are absent. We therefore deny enforcement of so much of the order as would require Cooper now to recognize the Union as representative of the Middlefield employees without prejudice to such further order concerning recognition as the Board may find proper after appropriate hearing, within a reasonable time after Cooper has made the reinstatement offer whose enforcement we here decree.

Since Cooper violated § 8(a)(5) by refusing to discuss the terms of transfer with the Union, requiring an offer of preferential reinstatement was proper. See Note, Labor Law Problems in Plant Relocation, 77 Harv. L. Rev. 1100, 1107-8 (1964). But reinstatement on what basis? The Trial Examiner said that "in accordance with the usual requirements," this "shall be to the employees' former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges." We are not sure whether or not this means at the Pequabuck rates of pay. Neither are we vouchsafed any light on the source of "the usual requirements"; if the Examiner was referring to cases of discriminatory discharge, these are inapposite since in such cases there would be no reason to doubt that the discharged employee would otherwise have continued at his existing rate of pay. We think the reinstatement offer should be on whatever basis emerges from good faith bargaining between Cooper and the Union; recognizing the

likelihood that such bargaining will produce little change from the current practices at Middlefield, we believe this would still be a much closer approximation to what bargaining would have yielded at the proper time. A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' direction in § 8(d) that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."

Award of back pay to workers who would have transferred to a new plant had there been proper bargaining is also something of a new departure. No such remedy was imposed in the leading relocation cases of the past decade—Brown Truck & Trailer; Bickford Shoes, Inc.; or California Footwear Co., in that case deliberately so, see the Examiner's discussion, 114 NLRB at 806, 37 LRRM 1037, and while the remedy was invoked in Rapid Bindery, we denied enforcement. The rather apparent motivation for the Board's current practice of utilizing this sanction in relocation cases, see Standard Handkerchief Co., 151 NLRB 15, 58 LRRM 1339 (1965); Die Supply Corp., 160 NLRB No. 99, 63 LRRM 1154 (1966); Garwin Corp., 153 NLRB 664, 59 LRRM 1405 (1965), enforced in part sub. nom. Local 57, ILGWU v. NLRB, —— F. 2d ——, 64 LRRM 2159 (D. C. Cir. 1967), is that an order merely requiring an employer to bargain with the union that had represented workers at an abandoned plant and offer preferential reinstatement is rather mild medicine whereas a recognition order runs into the difficulties we have mentioned and may be unfair to workers at the new plant. We think the Board is justified in requiring back pay in such cases for workers who would have transferred if proper bargaining had occurred. See Fibreboard Paper Prods. Corp. v. NLRB, supra, 379 U.S. at 215-17, 57 LRRM 2609. But the question again is back pay at what rate? The Examiner's solution—back pay at the rate provided in the old contract—would make the workers not merely whole but very much more; carrying over the old pay scales is something that Cooper was demonstrably unwilling to do and the Union rather obviously

lacked economic power to compel. Yet the function of the Board's remedy is to restore "the situation, as nearly as possible, to that which would have obtained but for" the illegal action, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 8 LRRM 439 (1941). Furthermore, to compute back pay on this basis would hopelessly complicate the determination of which employees would have transferred if proper bargaining had occurred. While the Board would naturally regard an actual transfer for a substantial period as satisfactory proof that an employee would have transferred, the prospect of a two-year back-pay award computed at an unrealistically high rate would be so powerful an incentive for such a transfer as to undermine an otherwise reasonable inference. This difficulty in determining who would have transferred under proper bargaining, as well as the harsher impact of an order dealing with an entire work force, cf. Fibreboard Paper Prods. Corp. v. NLRB, supra, 379 U.S. at 216, 57 LRRM 2609, sufficiently distinguishes the decisions enforcing back-pay orders for failure to bargain over subcontracting on which the Board relies. NLRB v. American Mfg. Co., 351 F. 2d 75, 60 LRRM 2122 (5 Cir. 1965) (subcontracting motivated by desire to escape union); NLRB v. Winn-Dixie Stores, Inc., 361 F. 2d 512, 62 LRRM 2218 (5 Cir.), cert. denied, 385 U.S. 935, 63 LRRM 2372 (1966); NLRB v. Johnson, 368 F. 2d 549, 63 LRRM 2331 (9 Cir. 1966), enforcing 155 NLRB 674, 60 LRRM 1364. Cf. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 47 LRRM 2900 (1961). Recognizing there can be no ideal solution we think that in this case back pay also should be based on the results of the bargaining now ordered or, if this has none, on the Middlefield scale. Here again we are also influenced by the greater severity of the order concerning this employer as contrasted with past treatment of more egregious violators of § 8(a)(5) and the lack of reasoned explanation for the difference.

We thus grant enforcement in part and deny it in part. The Board shall submit a decree in conformity with this opinion, in accordance with Rule 13(1) of this Court.

Statute Involved

The following provisions of the Labor Management Relations Act, 61 Stat. 136, et seq. (1947), 29 U.S.C. § 151, et seq.:

Sec. 7, Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *."

Sec. 8(a)(1), (2), (3), (5), Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1), (2), (3), (5):

> "Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> "(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *.
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Sec. 8(d), Labor Management Relations Act, 1947, 61 Stat. 142, 29 U.S.C. § 158(d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *."

Sec. 9(a), Labor Management Relations Act, 61 STAT. 143 (1947), 29 U.S.C. § 159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

UPREME COURT, U. S.

JUL 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1968

No. 160

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

THE PIERCE GOVERNOR COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT, THE PIERCE GOVERNOR COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Question No. 1

Whether an employer who relocates his plant for economic reasons is required to agree to the union's demand that all employees be guaranteed transfer to the new location in order to satisfy his duty to bargain with the union concerning the effects of the move on employees?

Question No. 2

Whether an employer who relocates his plant for economic reasons is required to recognize the union at the new location where the employees at the old plant do not transfer, or desire to transfer, to the new location in sufficient numbers to constitute a majority for the union, and where the union does not claim to represent a majority of the employees hired to work at the new location?

Question No. 3

Whether an employer who relocates his plant for economic reasons is required to agree to the union's demand that employees who engaged in strike misconduct or whose work performance was unsatisfactory at the old location be guaranteed transfer to the new location?

STATEMENT OF THE CASE

The "Statement of the Case" in the Petition (pp. 3-11) does not contain all of the facts material to the consideration of the questions presented.

Facts*

Petitioner was certified in 1941 as the bargaining representative of production and maintenance employees at the Anderson, Indiana, plant of Respondent, The Pierce Governor Company, Inc. (herein the "Company"). Thereafter, the Company negotiated with Petitioner and its Local 940 (herein sometimes referred to together as the "Union") a series of collective bargaining agreements, the most recent of which was terminated by timely notice on October 30, 1964. (A. 24a)

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* This statement of facts is based for the most part on the findings of fact contained in the decision of the Labor Board. Unless otherwise indicated, all page references herein are to the Appendix to the Petition for a Writ of Certiorari.

The parties began bargaining in September, 1964, for a new agreement. In the absence of satisfactory progress, the Union initiated a strike on November 6. This strike was admittedly economic at its inception. (A. 24a) The parties continued negotiations at meetings on November 16 and 20, and December 2 and 8. At the meeting of December 16, the Company advised the Union that for economic reasons it was contemplating moving its plant to the community of Upland, Indiana, some 40 miles away.[1] The Company offered to bargain about the relative advantages or disadvantages of the move itself. The Company further added that should the move be made, each employee presenting himself at the new plant would be given full consideration for reemployment and, if hired, would retain his seniority. (A. 24a, 33a, 38a-39a) With respect to recognition of the Union as the bargaining representative of employees at Upland, the Company stated that recognition would be dependent upon proof of representation. (A. 24a) The Union responded by stating that it wished to bargain for an agreement on the operations of the Anderson plant so long as it remained at that location, and the effects on the Anderson employees of a transfer of the Company's operations to any other community. (A. 25a)

The parties met on December 22 and 31, 1964, and again discussed the subject of transfer. On both occasions the Union demanded from the Company a "guarantee' to transfer all Anderson employees. The Company refused to accede to this demand by the Union explaining that certain of the employees were physically unable to perform a full

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[1] At the hearing, the parties stipulated that the physical condition of the plant at Anderson, Indiana, had deteriorated to a point where its continued operation without proper repair and remodeling created unsafe and unhealthful working conditions. It is not disputed that the move was precipitated by legitimate economic reasons and was in no way due to anti-union motives. (A. 38a-39a)

day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike. The Company renewed its offer to consider Anderson applicants in light of their qualifications for employment, with the retention of seniority for those hired. At the meeting of December 31, the Company added to its proposal by the offer of severance pay to those employees not hired. (A. 25a-26a, 39a-40a)

At a meeting on January 21, 1965, the Company offered immediately to declare the Anderson plant closed in order to enable the employees to draw unemployment compensation. The Company also offered to go to the "Federal Unemployment Service" to try to secure other jobs for the Anderson employees under what is known as the "Studebaker System." The Company further offered to increase severance pay for Anderson employees who did not transfer by using for that purpose the surplus in the pension fund. (A. 27a)

At a bargaining meeting on January 26, the Union stated that because of the economic differences between the two areas "very few" of the Union employes would care to transfer to Upland, and that while the Union did not expect the Company to transfer all Anderson employees to Upland, it did insist that the Company bargain with respect to the suitability of each Anderson employee for employment at Upland. (A. 27a-28a)

By letter dated January 28 addressed to the Union, the Company agreed to bargain with the Union as to each employee on the Anderson seniority list for employment at Upland, taking into account their qualifications for the work, physical condition, mental outlook and attitude, absentee record, and job openings at Upland. In the absence of a reply from the Union concerning the points raised in its letter of January 28, the Company withdrew its offer

on March 9, concluding with the comment, "We cordially invite your suggestions or comments as to where we go from here." (A. 29a)

On June 15, 1965, at a meeting to discuss pensions, the Union declared that there were only about 75 employees still on the picket line at Anderson and that only about 50 percent of them would be interested in going to Upland. (A. 31a)

Toward the end of November, 1965, the parties again met to discuss the transfer of Anderson employees. The Union estimated that only 40 to 50 employees would be interested in transferring to Upland. The Union proposed that Anderson employees considered by the Company to be physically unable to perform their jobs be given a physical examination at a medical clinic and approved or disapproved for employment on the basis of the examination, and that employees whose physical capacities were not in question be given rights to jobs at Upland, bumping, if necessary, any employees newly hired at Upland. The Company countered by proposing that the parties use an independent arbitrator to determine through "objective standards" which employees would be offered jobs at Upland. After the meeting, the Union telephoned the Company to inform them that the Union could not agree to this proposal. (A. 32a-33a)

No further proposals on the transfer of Anderson employees were made by either party. (A. 33a)

The Upland plant became available for occupancy in April, 1965. Only one production employee from Anderson requested to transfer and he was employed. The Company then staffed the Upland plant with newly hired production and maintenance employees, the number increasing from 100 at the end of April, to 212 by the end of August, and at least 190 at all times since August, 1965. (A. 25a)

The Decision of the Trial Examiner

(A. 1a-22a)

The Trial Examiner held that the Company violated Section 8(a)(5) of the Act by continuously refusing to bargain with Local 940 as an integral part of the joint bargaining agent as to (1) the effects of the removal of the Company's plant from Anderson to Upland, Indiana, and (2) the terms and conditions of employment at the Upland plant. In addition, the Trial Examiner found that the economic strike, which began at Anderson on November 6, 1964, was prolonged by the Section 8(a)(5) conduct and was converted to an unfair labor practice strike. (A. 16a-17a)

The Decision of the Labor Board

(A. 23a-37a)

The Labor Board reversed the Trial Examiner and ordered the complaint dismissed in its entirety. The Board found on the basis of the Company's conduct during frequent meetings and correspondence with the Union that the Company met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees and their transfer to the new plant. The Board also found that the Company was under no duty to recognize the Union at Upland since it was clear from the record that at no time did employees from Anderson have an interest in transferring to Upland in numbers sufficient to preserve the Union's majority at Upland. Finally, the Board held that since the Company engaged in no conduct that violated the Act, the economic strike which began on November 6, 1964, was at no time converted into an unfair labor practice strike. (A. 35a-37a)

The Decision of the Court of Appeals

(A. 38a-48a)

The Court of Appeals for the District of Columbia

Circuit affirmed the Board's dismissal of the complaint. The court held that there was substantial evidence to support the Board's holding that the Company had met its obligation to bargain with the Union concerning the effects of the move to Upland on Anderson employees. As stated by the court: "The record is replete with proposals, counter-proposals and concessions by the Company." (A. 40a)

A majority of the court also held that the Company did not violate its bargaining duty by refusing to recognize the Union at the new location. It based this holding on two alternate grounds.

First, the majority held that where an international union has been certified as the exclusive representative of employees, an employer does not violate Section 8(a)(5) of the Act by failing to recognize an uncertified local as the representative of these employees. Even though the local participates jointly with the international in bargaining negotiations, the employer's duty to recognize runs solely to the certified international. Applying this rule, the court concluded that the Company had not violated the Act since the Company had never failed or refused to recognize the certified International at Upland, but only the uncertified Local 940. (A. 42a-43a) This ground had not been a basis for the Labor Board's decision.

Secondly, the court held that regardless of whether the Local was entitled to recognition at the old location, it was not at the new location, since the Union never established, or even claimed, that it ever represented a majority of the employees at Upland. (A. 45a-46a) This was the same ground on which the Labor Board based its decision.

The Dissenting Opinion
(A. 47a-48a)

Chief Judge Bazelon dissented on the issue of the Company's duty to recognize the Union at the new location. As

to the first ground advanced by the majority, he held that the fact that only the International was the certified representative did not exclude the Local. As to the second ground, he was of the view that if the Upland plant was merely a continuation of the Anderson operation, the move did not present an occasion for questioning the Union's majority status. Judge Bazelon would have remanded to the Board for reconsideration of the continuation question.

ARGUMENT

Question No. 1

Petitioner phrases its first question in terms of whether an employer who relocates his plant satisfies his duty to bargain concerning the transfer of employees to the new location "if he insists throughout that they must apply for reemployment at the new location on the same basis as all other applicants. . . ." (Pet., p. 2) Based on this factual premise, Petitioner argues that the decision of the court below is in conflict with the decision of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (2d Cir. 1967). (Pet., pp. 11-13)

The factual premise (about quoted) upon which Petitioner bases its first question is not an accurate representation to this Court of the facts as found by the Board and accepted by the court below. First, at no time during bargaining on the transfer issue did the Company state or take the position that its Anderson employees were to be treated "on the same basis as all other applicants." Secondly, the Company did not "insist throughout" on its initial proposal as to employee transfers but substantially modified its position on several occasions during bargaining in an effort to reach agreement with the Union on this issue.

The Company made its original proposal on employee transfers to the Union on December 16, 1964—the first bar-

gaining session at which plant removal became an issue. The Company stated that "it would consider for transfer each Anderson employee who applied at the new plant, with seniority preserved for those hired." (A. 33a) On December 22, in response to the Union demand that the Company guarantee the transfer of all Anderson employees, the Company explained why this would not be feasible and listed three categories of employees which it felt were not qualified for employment at the new location. At a meeting on December 31, the Company modified its original proposal by the offer of severance pay to those employees who did not transfer to the new location.

On January 26, 1965, the Union acknowledged that it did not expect the Company to transfer all Anderson employees to Upland, but insisted that the Company bargain with respect to the suitability of each Anderson employee for employment at Upland. The Company promptly responded to this proposal by the Union, and three days later—by letter addressed to the Union—agreed to bargain as to each employee on the Anderson seniority list for employment at Upland. Six weeks later, having heard nothing from the Union, the Company withdrew its offer.

Several months later the Union proposed that employees whose physical capabilities were at issue be examined by a medical clinic with employment at the new location to be dependent on the results, and that all other employees be guaranteed transfer rights. The Company countered by proposing that the issue of employment at Upland of all employees it considered unqualified be submitted to an independent arbitrator for binding decision. This Company proposal was rejected by the Union.

The Board made detailed and extensive findings of fact and concluded on the basis of the Company's conduct during frequent meetings and correspondence with the Union, that the Company met its obligations to bargain concerning

the effects of the move to Upland on Anderson employees and their transfer to the new plant. As stated by the Board, "While the parties did not reach complete agreement on the transfer issue, the record shows that Respondent over a period of many months considered the Union's position, explained its own position, and made counter proposals as well as some concessions." (A. 35a)

The findings of the Board are, of course, to be upheld on review if such findings are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 492-97 (1951). Courts have also recognized that the evaluation of collective bargaining negotiations is one area in which the Board's expert experience and knowledge of bargaining problems is of particular importance and entitled to great weight. *Dallas General Drivers, Warehousemen and Helpers, Local 745 v. NLRB,* 355 F.2d 842, 844-845 (D.C. Cir. 1966).

The court below held that there was substantial evidence to support the Board's findings that the Company satisfied its duty to bargain concerning the effects of the relocation on Anderson employees. (A. 40a) This holding of the court is amply supported by the facts of the case. Petitioner's representation to this Court that the Company insisted throughout negotiations that Anderson employees must apply for reemployment at Upland on the same basis as all other applicants is not an accurate statement and is directly contrary to the findings of fact made by the Board.

Petitioner contends that the decision of the court below is in conflict with the holding of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (2nd Cir. 1967). This contention is without merit. Petitioner confuses a rule of law with a result in a case. It is true that the result reached by the court below differed from the result reached by the Court of Appeals for the Second Circuit, but not because of an application of conflicting rules

of law but rather because of the application of the same rule of law to different factual situations.

In *Cooper*—a plant removal case—the company at the outset of negotiations took the position that it would not deal with the union on the issue of employee transfers but would deal only with the employees on an individual basis. Employees could file employment applications at the new location and would be treated the same as any new job applicant. There would be no carry over of seniority. The company never retreated from this position. The union's proposal was that all the employees be guaranteed transfer rights to the new location with the same wage rates and fringe benefits that were in effect at the old location. During negotiations the company refused to furnish information to the union concerning jobs that would be available at the new location, and then proceeded to deal individually with employees rather than through their bargaining representative. Based on a combination of these factors, the Board found a violation of Section 8(a)(5) in the company's refusal to bargain over the effects on its employees of the move.

In enforcing this portion of the Board's order, the Second Circuit made it quite clear that enforcement was not based on the company's refusal to *agree* to the union's demand of guaranteed transfer rights, but rather on the company's refusal to *discuss* the issue of employee transfers with the union.

> "[T]he Board may reasonably interpret § 8(a)(5), as explicated in § 8(d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union and to negotiate the terms of the shutdown . . . but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests. * * * While

> Cooper was not bound to agree to the Union's demand that the Pequabuck employees 'be taken' to Middlefield with everything unchanged or even to less burdensome proposals, the Board could properly fault it for an attitude which, in effect, ousted the Union from any role in negotiating what might be offered to employees desiring to transfer." 376 F.2d at 688 (A. 54a)

Petitioner's statement that "the facts of the two cases are virtually identical" is inaccurate. (Pet., p. 11) In *Cooper,* the company refused to discuss with the union the issue of employee transfers and, instead, insisted on dealing directly and individually with the employees themselves. These were the crucial factors from which the Board and the Second Circuit concluded that the company had failed to bargain with the union. Neither of these two crucial factors is present in the instant case. The Company was willing to and did discuss the issue of employee transfers with the Union during many bargaining meetings and substantially modified its original proposal in an effort to reach agreement with the Union. Furthermore, the Company never dealt individually with employees or attempted to oust the Union from a meaningful role in negotiations.

The decision of the Second Circuit in *Cooper* and the decision of the court below in the instant case both stand for the same legal proposition: An employer must bargain with the union over the effects of a plant removal on employees, including transfer rights of employees to the new location, but the employer is not obligated to agree to the union's demand of guaranteed transfer rights for all employees. The two courts applied the same legal principle, but a different result was reached by each because of different facts. There is no conflict between the Courts of Appeal for the Second Circuit and the District of Columbia Circuit on the questions herein involved.

Question No. 2

The Company refused to recognize the Union at the new plant until and unless it was able to demonstrate its majority there. The Board and the court below held that the Company's refusal to recognize the Union was not unlawful since it was clear from the record that at no time did employees desire to transfer to Upland in sufficient numbers to constitute a majority for the Union. (A. 36a, 45a-46a)[2]

The issue of whether a union's status as bargaining representative continues at the new location after a plant removal has been presented to the courts of appeal on several occasions. With but one exception, the courts have held that the union's status as bargaining representative does not carry over to the new location unless the evidence shows that employees have transferred to the new location in numbers sufficient to constitute a majority of the employ-

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[2] As an alternate ground for its holding on the recognition question, the court below ruled that the Company had not violated the Act because it had never refused to recognize the certified International at Upland, but only the uncertified Local 940. This ground had not been a basis for the Labor Board's decision. The Company does not intend to argue the validity of this ground. It is well settled that, in the review of judicial proceedings, a lower court's decision will be affirmed if any grounds relied on by the court are sufficient to justify its holding. *Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *Nuttall v. Reading Co.,* 235 F.2d 546, 548 (3d Cir. 1956); *Amerada Petroleum Corp. v. Federal Power Com'n,* 285 F.2d 737, 738 (10th Cir. 1960); *Carrigan v. California State Legislature,* 263 F.2d 560, 565 (9th Cir. 1959), *cert. denied,* 359 U.S. 980. It is the Company's position that the "majority-status" ground relied on both by the Board and the court below—and discussed above—is sufficient to justify the holding that the Company did not violate the Act by refusing to recognize the Union at Upland.

ee complement at the new location.[3] *Local 57, ILGWU v. NLRB (Garwin Corp.)*, 374 F.2d 295 (D.C. Cir. 1967); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684 (2d Cir. 1967); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *NLRB v. MacKneish*, 272 F.2d 184 (6th Cir. 1959).[4] This rule on recognition in plant removal cases is consistent with the general rule on recognition applied by the Board, and approved by this Court, to the effect that at any time after the certification year an employer may lawfully refuse to bargain with a union if he has fair doubts about the union's continued majority status. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

The reason for this holding is based on one of the Act's most basic policies—employee freedom to select a bargaining representative. If an employer is compelled to recognize and bargain with a union as bargaining representative of employees at the new location even though employees from the old location have not transferred in numbers sufficient to preserve the union's majority at the new location, then a bargaining representative has been imposed on the employees at the new location without reference to their choice. Such action violates one of the fundamental rights granted employees in Section 7 and Section 9(a) of the

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[3] The one exception is *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957). The court upheld a bargaining order based on the Board's findings that employees at the old location would have transferred to the new location in numbers sufficient to preserve the Union's majority had it not been for the company's unfair labor practices.

[4] *Compare NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77 (6th Cir. 1963) and *NLRB v. Hurley Co.*, 310 F.2d 158 (8th Cir. 1962), where bargaining orders were enforced on the basis of evidence showing that a majority of employees at the new location had transferred from the old location.

Act.[5] *Local 57, ILGWU v. NLRB (Garwin Corp.)*, 374 F.2d 295, 300-301 (D.C. Cir. 1967).

The bargaining units at Anderson and, ultimately, at Upland were of approximately the same size—200 employees. Only one Anderson employee in fact transferred to Upland, and the Union itself estimated that at best only 40 to 50 Anderson employees might be interested in transferring. (A. 45a-46a) Based on these undisputed facts and applying the rule on recognition in plant relocation cases, the Board and court below held the Company was within its rights in insisting that the Union demonstrate its majority status at Upland before according recognition.

Petitioner does not dispute that the holding by the Board and court below is in accord with the present rule on recognition in plant relocation cases. The contention by Petitioner is that this rule is in basic conflict with two other

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[5] Sec. 7, Labor Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C. § 157:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *."

Sec. 9(a), Labor Management Relations Act, 61 STAT. 143 (1947), 29 U.S.C. § 159(a):

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

Labor Act doctrines dealing with change—the successorship and contract bar doctrines—and should therefore be overturned by this Court. (Pet., pp. 19-20) The Company agrees that the doctrines of successorship and contract bar are relevant; however, an examination of these doctrines shows that they are consistent with the holding in the instant case —and the general rule—on recognition in a plant relocation situation.

Under the successorship doctrine, a purchaser who continues the seller's enterprise along the same general lines and with the same employee work force is presumed to succeed to the seller's duty to recognize and bargain with the union. The reason for this doctrine is that it is logical to assume that since the same employees were employed both before and after the sale, the employees' choice of bargaining representative will remain the same. If, however, the successor employer has sufficient grounds to justify a reasonable doubt concerning the union's continued majority, the Board has consistently held that the successor may refuse recognition and demand that the union demonstrate its continued majority status. *Mitchell Standard Corp.*, 140 NLRB 496 (1963); *Diamond National Corp.*, 133 NLRB 268 (1961)

On page 20 of its Petition, Petitioner argues that in successorship cases the Board will require the successor to recognize the incumbent union even though there has been sufficient turnover so that the old employees do not constitute a majority after the change in ownership. Three cases are cited by Petitioner in support of this proposition: *Krantz Wire & Manufacturing Co.*, 97 NLRB 971, 987 (1952), *enf'd sub nom., NLRB v. Armato,* 199 F.2d 800 (7th Cir. 1952); *Firchau Logging Co., Inc.*, 126 NLRB 1215, 1221 (1960); *Howard Johnson, Inc. of New Jersey,* 135 NLRB 1260, 1268 (1962), *enf'd,* 371 F.2d 1 (3d Cir. 1963), *cert. denied,* 375 U.S. 920. None of these cases is in point. Each

case involves a factual situation where the change in ownership occurred *within* the certification year. The Board, with this Court's approval, has uniformly held that during the first year of a union's certification, an employer must honor the Board's certification, but that after the certification year, the employer may refuse to bargain with the union if he has fair doubts about the union's continued majority. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

Under the contract bar doctrine, where a plant under a union contract moves a short distance and a considerable number of employees go along, the contract bars an election at the new location. The reason for this doctrine is that it is logical to assume that since the employees are the same both at the old and the new location, the employees' choice of bargaining representative and the contract negotiated by the bargaining representative will remain the same. If, however, a considerable proportion of the employees do not transfer to the new location, the Board refuses to apply its contract bar doctrine. *Edward Aaron Corp.*, 125 NLRB 840 (1959).

Petitioner cites two cases as authority for the proposition that the Board does not require that the old employees constitute a majority at the new location in order for the contract to bar an election. *Viewlex, Inc.*, 48 LRRM 1585 (1961) is a decision by a regional director—not the Board—and lacks precedential value. *Yale Rubber Mfg. Co.*, 85 NLRB 133 (1949) does not support the Union's position. In *Yale* the employer shut down its operations at the old location in February, 1949, and began full capacity operations at the new location in March, 1949. By the date of the Board hearing—April 13, 1949—the work force at the new location numbered 150, 96 of whom had been employed at the old location. On the basis of these facts showing that a majority had transferred, the Board refused to test the union's majority at the new location.

There is no conflict between the rules applied by the Board in contract bar and successorship cases and the recognition rule applied in the instant case. The fact of a change in business ownership or a change in plant location does not affect the status of the employee's bargaining representative *where the employees who selected that bargaining representative remain the same.* But where there is a substantial change in the employee complement so as to justify a reasonable doubt that the union has retained its majority status, the union is no longer entitled to recognition as a matter of right but is required to establish its majority status.

The rule in plant relocation cases that a union is entitled to automatic recognition at the new location only if employees transfer in sufficient numbers to preserve the union's majority is consistent with the basic principles of the Act and related Board doctrines, and a rule that should not be overturned by this Court.

Question No. 3

In its Question No. 3, Petitioner states that in bargaining over the transfer of employees to the new location, the Company "never once swerved from its position that the employees it considered lazy or guilty of misconduct would definitely not be rehired." (Pet., p. 23) Based on this factual premise, Petitioner argues that the Company in effect discharged these employees unilaterally without engaging in collective bargaining with the Union. (Pet., p. 22)

The fallacy in this contention by Petitioner is that the factual premise upon which Petitioner bases its legal argument is directly contrary to the facts in the case as found by the Board. Petitioner is in effect asking this Court for an advisory opinion based on a hypothetical fact situation.

During bargaining the Company agreed to bargain with the Union as to each individual on the Anderson seniority list for employment at Upland. (A. 29a, 34a) At a later point in bargaining, the Company proposed that an independent arbitrator be used to determine through objective standards which Anderson employees should be offered jobs at Upland. (A. 33a, 35a) These facts are undisputed. Petitioner's representation to this Court that the Company "never once swerved from its position that the employees it considered lazy or guilty of strike misconduct would definitely not be rehired" is simply not true.

The Board and the courts have long held that an employer is justified in refusing to reinstate or rehire employees who engage in strike misconduct. *Oneita Knitting Mills, Inc. v. NLRB,* 375 F.2d 385, 390 (4th Cir. 1967); *Rangaire Corp.,* 157 NLRB 682 (1966). Similarly, inefficiency, poor work, low production or loafing has been held sufficient justification for a refusal to rehire or reinstate. *Addison Shoe Corp.,* 151 NLRB 65 (1965); *Corbin-Dykes Electric Co.,* 141 NLRB 1198 (1963); *The Lane Construction Corp.,* 138 NLRB 1118 (1962).

The Company was under no obligation to guarantee the transfer of employees who engaged in strike misconduct or whose work performance was unsatisfactory at the old location. The Company satisfied its duty to bargain concerning the transfer of these employees by agreeing to bargain with the Union as to the employment rights of each of the employees in question, or, as an alternate, by agreeing to submit the issue of their employment rights at Upland to an independent arbitrator. There is no support in the record for Petitioner's contention that the Company in effect unilaterally discharged these employees without engaging in collective bargaining.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 160

In the Supreme Court of the United States

OCTOBER TERM, 1968

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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312-962—68

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 38a–48a) is not yet officially reported. The Board's decision and order (Pet. 1a–37a) are reported at 164 NLRB No. 2.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1968 (Pet. 38a). The petition for a writ of certiorari was filed on June 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's conclusion that the employer met its obligation to bargain with the union representing the employees at the old plant, concerning the effects of a transfer of operations to a new plant some 35 miles away.

2. Whether, in the circumstances of this case, the Board properly concluded that the employer was not obligated to recognize and bargain with the union as the representative of the employees at the new plant.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. *et seq.*), are set forth in the Appendix to the petition, pp. 61a–62a.

STATEMENT

For many years, the Pierce Governor Company engaged in the manufacture and sale of automotive parts at a plant in Anderson, Indiana. In 1941, the petitioner International Union was certified by the Board as the statutory bargaining representative of the production and maintenance employees at the Anderson plant (J.A. 176).[1] Thereafter petitioner and the Company negotiated successive collective bargaining contracts, the last of which expired on October 30, 1964 (J.A. 99–133). Petitioner participated in these nego-

[1] "J.A." refers to the portions of the record printed in the Joint Appendix to the briefs in the court below.

tiations with its Local 940, and the Company has recognized that the International and the Local act as a joint representative in negotiating and administering the contracts (J.A. 201, n. 2; 103, 104).

Negotiations for a new contract began in September 1964, about two months before the last contract expired. After several bargaining sessions, the Union became dissatisfied with the progress of negotiations and, on November 6, 1964, initiated a strike (J.A. 178, 202; 40). At the time the strike began, there were about 202 employees in the bargaining unit at the Anderson plant (J.A. 8).

At the contract negotiation meeting of December 16, 1964, the Company attorney and chief negotiator Donald Strutz referred to the Union's complaints about the old and dilapidated condition of the Anderson plant and explained that the Company had received a variety of offers from other communities to induce the Company to relocate its facilities. Strutz said that the town of Upland, Indiana, about 35 miles from Anderson, had made the "most attractive offer" and that the Company considered it "economically advantageous" to move there (J.A. 202; 159–160, 164). However, Strutz added, the Company was:

> * * * more than willing to bargain with [the] committee and the Union concerning the relative advantages and disadvantages of such a move and to consider all arguments which the Union may propose to overcome what appears to us to be the obvious economical advantage of making this move. [J.A. 160.]

Strutz recommended that bargaining about a new labor agreement be suspended temporarily to permit full negotiations about the contemplated plant removal; he added that there were still "many contingencies to be worked out" before the Company became "finally committed to make the move" (J.A. 160).

The Union answered that it wanted to bargain for an agreement covering (1) the operation of the Anderson plant so long as it remained at that location; and (2) the effects on the Anderson employees of a transfer of operations to some other location (J.A. 203, 179; 17–18, 162–164). The Union did not request bargaining about the propriety of the plant removal itself. At the conclusion of the meeting, the Company and the Union each submitted proposals for the terms of an interim agreement for the Anderson plant (J.A. 179–180; 18, 36–37, 41–42, 173).

At the next meeting of the parties on December 22, 1964, the Union asked that the Company "guarantee" the transfer of all Anderson employees to the new location. In reply, the Company offered to give consideration to Anderson employees who apply at the Upland plant for employment, with retention of seniority for all those hired (J.A. 19, 160). However, the Company gave three reasons why it would not "guarantee" the transfer of *all* Anderson employees: (1) certain employees were physically unable because of age or health to perform a full day's work; (2) certain employees had not been "delivering a fair day's work," although physically capable; and (3) certain employees had become "unfitted for further

employment" with the Company because of misconduct during the strike (J.A. 203; 19–20). The parties then specifically referred to and discussed several employees in the first category (J.A. 20).

The parties met again on December 31, 1964, at which time the Company announced that it had now committed itself to moving to Upland and had directed a contractor to start construction of a new building there on January 4, 1965 (J.A. 12–13, 21, 43, 47, 50). The Union renewed its demand for a Company guarantee of transfer rights for all Anderson employees, and the Company again offered to consider for employment any applicant from Anderson and to preserve seniority for all those hired (J.A. 47). The Company also announced its willingness to grant severance pay to those who were not hired (J.A. 204; 174). In response to a Union question, the Company stated that as of that time no jobs had been "promised" to the town of Upland (J.A. 47).

On January 9, 1965, when the parties met again, the Union took the position that it did not want to bargain for an interim contract for the Anderson plant but wanted to bargain on pay rates at the Upland plant. The Company replied that it was not obligated to bargain with the Union concerning pay rates for Upland employees, who had the right to choose their own bargaining representative (J.A. 43). The Union then proposed to discuss, person-by-person, which of the employees on the seniority list would be transferring from Anderson to Upland. The Company refused, on the ground that it had inadequate information as to the amount of business it would have at

Upland and "how much help we would need" (J.A. 44). However, the Company reiterated its earlier offer to give consideration to Anderson applicants, with seniority for those hired and separation pay for those not transferred (J.A. 204; 44).

At the January 20 meeting, an employee subcommittee, which the Union had formed at the suggestion of a Federal Mediator, renewed the demand for a discussion of the suitability of each employee on the Anderson seniority list for transfer to Upland. But, when two members of the subcommittee remarked that they would not transfer to Upland "regardless of what rate of pay was offered" (J.A. 55), the Company responded that it seemed ridiculous to go down a seniority list of 180 employees and discuss the prospects of Anderson employees who would not be interested in a transfer in any event (J.A. 205; 54–55).

On January 26, Union Regional Director Raymond Berndt and Company Attorney Thomas Logan met for an informal exchange of views (J.A. 206; 60–61). Berndt stated that the "economic make-up" of the Upland area and its distance from Anderson were such that it was a mistake to permit negotiations to "bog down" in a discussion of transfer rights. When Logan agreed, Berndt expressed his opinion that the "important thing was representation by some local of the United Auto Workers." Logan replied that he could see the advantages of UAW representation and suggested that their discussion follow that line, "keeping in mind that it was relatively academic to talk about transfer rights" in view of Berndt's opinion that "very few of the Union employees at Anderson

would care to come" to Upland (J.A. 61). They discussed the possibility of a contract without a provision concerning transfer rights, with a new UAW local (J.A. 61). Berndt gave Logan for study a copy of a contract executed by the Union and another employer located in another Indiana community (J.A. 62). A day or two later, Berndt asked Logan to confirm their conversation (J.A. 62).

By letter dated January 28, 1965, Logan complied with Berndt's request (J.A. 207, 181–182; 62–63, 136–140). Logan indicated that the Company was willing to recognize "a UAW–CIO Local at Upland" for a five-year contract, but was "not willing to recognize Shetterly [2] and his bargaining committee" with respect to the Upland plant. Logan also stated that the Company would bargain over each Anderson employee on the seniority list for employment at Upland, taking into account (1) his qualifications for the work; (2) physical condition; (3) mental outlook and attitude; (4) absentee record; and (5) job openings. Logan added that the Company would give severance pay to all employees with a minimum of ten years' service if they desired employment at Upland but were not hired, and those hired would retain their seniority. The letter closed with a suggestion that Berndt propose a formal contract, which Logan would immediately take up with the Company's Board of Directors (J.A. 207–208; 136–140).

[2] Union International Representative Shetterly had been the leading Union spokesman in the prior negotiations.

By letter dated March 10, 1965,[3] Berndt indicated acceptance of most of the Company's proposals, but expressed reservations or disagreement with respect to the remainder (J.A. 208–209, 183; 144–146). He stated that the Company's proposal that the parties bargain on the individual availability of all employees presently on the seniority list for employment at Upland was acceptable, so long as "physical shortcomings" already in existence at the time of the closing of the Anderson plant and the "mental outlook and attitude" displayed by some employees since the beginning of the strike would not be used to prevent their employment at Upland. He also stated that it was the Union's prerogative "to assign the Local Union number to any UAW bargaining unit" and a Union representative to any particular local. However, he conceded that it would be shortsighted for the Union to make an assignment that would only result in stalemates rather than fruitful negotiations. He closed by suggesting another meeting to settle their differences (J.A. 208–209, 183; 144–146).

During the next three months, no further correspondence ensued, nor did the Union request a bargaining meeting (J.A. 209, 183; 37, 64, 74–75). Meanwhile, the Company began to effect the removal of its operations. In April, it was able to occupy the newly-

[3] Events prior to February 25, 1965, occurred more than six months prior to the Union's filing of charges against the Company, and hence, under Section 10(b) of the Act (Pet. 23a, n. 1, 35a), may not themselves form the basis of an unfair labor practice finding. These events are recounted here solely to establish the background of the bargaining that occurred within the 10(b) period.

constructed plant in Upland; by August 1, the employee complement there was 212, and it never fell below 190 subsequently (Pet. 46a; J.A. 180–181; 10, 11, 51)..Only one of the employees who worked in the bargaining unit at Anderson also worked at Upland; all the other Upland employees were new. There was no evidence that any Anderson employee applied for employment at Upland (Pet. 46a; J.A. 181; 10–11, 51).

On June 15, 1965, with a Federal Mediator present, the parties discussed and settled the pension rights of Anderson employees who reached retirement age during the strike (J.A. 25, 56–57, 65). With respect to the transfer issue, Union Representative Shetterly stated that there were only about 75 employees on the picket line at Anderson, and that only about 50 percent of them would be interested in transferring to the Upland plant (J.A. 209; 57). The Union expressed the desire for further discussion of the transfer rights of the former Anderson employees on various occasions in the next five months (J.A. 209–210; 25–27, 148, 149, 151–153, 156–157). The Company indicated its willingness to meet, but took the position that the Anderson employees were not entitled to transfer as of right, and that the Union was not entitled to bargain for the employees at Upland unless it could establish that it had majority support there (J.A. 210, 184; 150–151, 154–155, 158).

On November 24, 1965, the parties again met with a Federal Mediator to discuss the possible transfer of Anderson employees to Upland. Union Representative Shetterly estimated that—after elimmating those em-

employees to the new plant (Pet. 2, Questions No. 1 and No. 3) boils down to whether substantial evidence supports the Board's finding (Pet. 35a), sustained by the court below (Pet. 40a, 41a), that the Company did in fact bargain with the Union about that subject. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement (*supra,* pp. 3–10) show that the Company bargained with the Union at length about the effects on the Anderson employees of the move to Upland, including the matter of transfer.

Petitioner claims that the decision below is in conflict with *Cooper Thermometer Co.* v. *National Labor Relations Board,* 376 F. 2d 684 (C.A. 2) (Pet 49a–60a). Since the Board's resolution of the issue was upheld in that case (with modification of remedies), as it was in the present case, the contention really is that the Board was in conflict with itself in the two decisions. In any event, there is no conflict. In *Cooper Thermometer,* as the Second Circuit found, the employer had, "in effect, ousted the union from any role in negotiating what might be offered to employees desiring to transfer" (Pet. 54a); *i.e.,* it had flatly refused to bargain about the transfer. Here, on the other hand, the Company was always willing to discuss with the Union the employment conditions that would be offered to employees who transferred and the general qualifications for transfer. Moreover, although the Company was initially reluctant to discuss the transfer potential of each individual employee

before knowing the employment requirements at the new plant and which employees would be willing to transfer, it ultimately offered to bargain about each Anderson employee on the seniority list and to submit to arbitration the question of which employees should be offered jobs at the Upland plant (*supra*, pp. 6–10).[5] In short, here the Company, after extensive bargaining, could not reach agreement with the Union about employee transfers, while in *Cooper Thermometer* the employer refused to negotiate with the union at all on the subject; the former is not a violation of the duty to bargain under the Act, while the latter is.[6]

2. Petitioner's further contention that it was entitled to represent the Upland employees without the necessity of establishing that it had the support of a majority of those employees rests on the premise that the Upland plant was just a continuation of the Anderson plant (Pet. 20). However, although many of the supervisory and clerical employees of the Ander-

[5] There is no substance to petitioner's contention (Pet. 22–24) that the Company, in effect, unilaterally discharged certain employees by stating that it would not rehire those who had not been delivering a fair day's work or who were guilty of strike misconduct. The Company's position was not taken unilaterally, but was the subject of extensive negotiations between the parties. Moreover, as a result of the bargaining, the Company receded from its initial position and proposed that an independent arbitrator determine, by objective standards, not only the issue of physical incapacity (see Pet. 23), but the entire question of which employees would be offered jobs at the Upland plant (J.A. 211; 30, 67–68).

[6] Chief Judge Bazelon, who dissented on the second issue (discussed *infra*), specifically agreed with the majority that *Cooper Thermometer* was distinguishable because there, unlike here, the employer had not bargained at all (Pet. 48a).

son plant transferred to Upland, the new plant was located about 35 miles from the old plant, it was apparent throughout the course of the bargaining negotiations that less than a majority of the Anderson production and maintenance employees were interested in transferring to Upland (*supra,* pp. 6–10), and only one such Anderson employee did in fact transfer (*supra,* p. 9). In these circumstances, the Board was reasonable in concluding that the presumption of continuing majority support which flowed from the Union's past status was rebutted. In contrast to the case of a mere move across the street, the Company here had a substantial basis for questioning whether the Union would represent the production and maintenance employees at Upland, and in thus refusing to recognize it as their representative, absent proof of majority support.

The cases cited by petitioner deal with situations where the union assertedly lost majority support within the first year of its certification (Pet. 20), or where an outstanding collective bargaining agreement barred a representation election to test the union's continued majority (Pet. 21). In these situations, it was necessary to accommodate the right of employee free choice to other valid policies—*i.e.,* the policy of giving certified unions a fair opportunity to achieve their bargaining aims (see *Brooks* v. *National Labor Relations Board,* 348 U.S. 96), or the policy of promoting industrial stability (*Leedom* v. *Int'l Bro. of Electrical Workers,* 278 F. 2d 237, 242 (C.A.D.C.)). There is no countervailing policy here which would justify a departure from the general principle that

employees have the right to choose their own bargaining representative and that a union is not entitled to recognition as the employees' exclusive representative absent a showing of majority support. See *Int'l Ladies Garment Workers Union* v. *National Labor Relations Board*, 366 U.S. 731, 737.[7]

CONCLUSION

The petition for certiorari should be denied.

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JULY 1968.

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[7] Since, in view of the considerations set forth above, the Company was justified in refusing to recognize both petitioner International Union and its Local 940 as the representative of the Upland employees absent proof of majority support, there is no need to reach the propriety of the court of appeals' alternative ground of decision, *i.e.*, that the Company was in any event not obligated to recognize Local 940 since only the International had been certified as the bargaining representative (Pet. 41a–43a).

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v.

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and

THE PIERCE GOVERNOR COMPANY, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

The positions taken by the Board and the Company in their briefs in opposition confirm that each of the two alternative grounds upon which the court below bases its

ruling that the Company was under no obligation to recognize the Local at the new location presents an important question of federal labor law (Questions No. 2(a) and (b) of the petition).*

1.

The first ground is that where an international union and its local constitute a joint bargaining agency, but only one holds an NLRB certification, the employer is *never* under an

---

* As to Question No. 2, the Company contends that the conflict we claim between this case and *Cooper Thermometer Co. v. N.L.R.B.*, 376 F. 2d 684, 687-88 (2d Cir. 1967) (Pet., pp. 49a-60a, 53a-54a), is based on our erroneous assertion that here, as there, the Company said applicants from the old location would be considered for work at the new location on the same basis as all other applicants (Co. brief, pp. 8-12). But the court below is explicit on this point:

> "The Company assured the Union that no jobs had been promised at Upland and that *all applications would be given equal consideration*, including such factors as age, health, qualifications, and prior employment records." (Pet., p. 40a; emphasis added).

As to Question No. 3, the Company claims our position is based on the erroneous view that the Company never once swerved from its position that the employees it considered lazy or guilty of misconduct would definitely not be retired (Co. brief, pp. 18-19). Here, too, the court below was explicit:

> "The Company's position was that it would give consideration to any Anderson employee who applied at Upland, with retention of seniority for all those hired, but would not 'guarantee' transfer, because some of the employees at Anderson were physically unable to perform a full day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike which the Union had initiated in November, 1964, when negotiations on the original Anderson contract had broken down." (Pet., pp. 39a-40a).
>
> * * * * *
>
> "The Company had a well-defined position on transfers, which it stated, explained and discussed at great length. *This position did not change throughout the bargaining*, but such a course is not unlawful [footnote omitted]". (Pet., p. 41a; emphasis added).

obligation to recognize the uncertified member, provided he recognizes the certified. The Board and the Company agree that this ground is original with the court below and was not one upon which the Board rested. Moreover, both decline to defend the ground, taking the position, instead, that the court's alternative ground provides adequate support for its ruling (Bd. brief, p. 15, n. 7; Co. brief, p. 13, n. 2). That the Board, short of defending the rule, should not even express agreement with it implies that it regards the rule as erroneous. It is now, however, a part of the federal labor law, and will so remain unless reviewed and reversed by this Court.

Ordinarily, where a court of appeals, in affirming a Labor Board decision, does so on the basis of a ground the Board did not employ, resolution of any implied conflict between the Board and the court over the court's ground can await a later case posing the same issue in which the Board can adopt or reject the court's ground. In the instant case, however, time is of the essence. As we noted in the petition (pp. 16-17), without demurrer from the Board or the Company, bargaining relationships in which the bargaining agent is a joint agency consisting of an international and its local, only one of whom is certified, are commonplace; and, until now, it has been generally assumed that both members of the bargaining agency must be recognized, the uncertified as well as the certified. The decision in this case casts a definite shadow over all such bargaining relationships. It is not hard to imagine situations in which the employer, on good terms with the international, but on bad with the local, which happens to be uncertified (or vice versa), sits down to bargain a new contract and insists that it is not going to recognize or bargain with the uncertified local, citing this case.

The country has labor problems enough, we submit, without needlessly jeopardizing a host of well-established bargaining relationships from which we could otherwise expect responsibility and stability.

2.

Moreover, the Board's brief in opposition confirms that the circuit court's alternative ground for excusing the Company from recognizing the Local at the new location (that the Local did not represent a majority there) presents a question of federal labor law almost as important as its first ground.

In its brief, the Board acknowledges that there *are* situations in which it *does* require the employer to continue recognizing the union after a significant change which results in his hiring a new work force, less than a majority of whom are old employees and union members: where the change is (1) a sale or other transfer of the operations, or (2) a relocation of the plant—provided, in both cases, the change occurs during the term of a collective bargaining agreement, or the first year of the union's certification. In such situations, the public's interest in industrial stability and in allowing unions a fair chance to achieve their bargaining aims requires that the changes and the new work forces they result in not be taken as occasions for questioning the union's majority status, the Board maintains (Bd. brief, pp. 14-15). We agree.

But the instant case differs from these situations only in that the change that resulted in the new work force occurred after the expiration of the old contract and before a new one had been agreed to, rather than during the term of the contract. Had the relocation here occurred *after* a new contract had been negotiated for the old location, the

Board would not have taken the move and the new work force hired at the new location as cause for questioning the Local's majority. Because it happened between contracts (when the need for "stability" and "fairness" was even greater), the Board refused to require continued recognition. We submit that this paradox requires review.

Moreover, the Board's rule makes it virtually riskless for an employer who is willing to spend some money, to rid himself of his employees' union. Between contracts, all he need do is move his plant to a new location beyond easy commuting distance, hire a new work force, and refuse to recognize the union there on the ground that it lacks a majority. Since there is no contract in effect and the union's certification year has long since expired, the Board, under the rule of this case, would excuse him from further recognition.

CONCLUSION

So that the conflict between this decision and the Second Circuit's in *Cooper Thermometer v. NLRB*, 376 F. 2d 684, 687-88 (1967), may be resolved, and the other important questions of federal labor law presented by this decision reviewed, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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